Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

THOMAS RUSKIN, also known as Thomas Rufkin,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant has a reasonable expectation of privacy in his telephone conversations when he uses a traditional land-based telephone, but when unknown to him the person with whom he speaks uses a cordless telephone.

2. Whether a defendant's Fourth Amendment right against unreasonable searches and seizures is violated by the interception and tape-recording of his telephone conversations, without a warrant and without the consent of the conversants, when the defendant uses a traditional land-based telephone, but when unknown to him the person with whom he speaks uses a cordless telephone.

LIST OF PARTIES

Thomas Ruskin is the Petitioner. He appears herein through retained counsel, J. Michael Small and Phyllis E. Mann.

The United States of America is the Respondent, appearing through United States Attorney, Western District of Louisiana, Michael D. Skinner, and/or through Solicitor General of the United States.

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PETITION FOR WRIT OF CERTIORARI

Thomas Ruskin petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit reversing the trial court's grant of the *Motion to Suppress* is included in the appendix to this petition, beginning at page A-1. The unpublished order of the United States District Court, Western District of Louisiana, denying the Government's *Motion to Reconsider* is included in the appendix to this petition, beginning at page B-1. The unpublished opinion of the United States District Court, Western District of Louisiana, granting defendant's *Motion to Suppress* is included in the appendix to this petition, beginning at page C-1. The unpublished transcript of the hearing on defendant's *Motion to Suppress*, in the United States District Court, Western District of Louisiana, is included in the appendix to this petition, beginning at page D-1.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered the decision sought to be reviewed in this case on May 14, 1998. 28 U.S.C. § 1254 confers on this Court jurisdiction to review on writ of certiorari the

judgment of the United States Court of Appeals for the Fifth Circuit.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . "

STATEMENT OF THE CASE

This case squarely presents the issue of whether a person who speaks on a traditional land-line telephone has a reasonable expectation of privacy in his telephone conversations where the possibility exists, as it always does, that the person to whom he speaks uses a cordless telephone. The Court of Appeals for the Fifth Circuit held in this case that Thomas Ruskin did not have a reasonable expectation of privacy when he spoke on a traditional land-line telephone, but unknown to him the person to whom he spoke used a cordless telephone. See Appendix pages A-1 – A-3. Particularly, the Fifth Circuit said, Mr. Ruskin failed to carry his burden of proving that his expectation of privacy was reasonable because he did not present evidence of the technological attributes of the cordless telephone used by the person to whom Ruskin spoke. See Appendix page A-2.

In *Katz v. United States*, 389 U.S. 347 (1967), the Court held a defendant had a reasonable expectation of privacy in his telephone conversation, conducted on a public telephone, that was protected by the Fourth Amendment from unreasonable search and seizure. This Court has not directly addressed the issue presented here. The issue presented in this case should be addressed by this Court because of the wide-spread use of cordless telephones and, perhaps more importantly, because of the rapidity with which technology is changing in the area of communications. The Court should make clear the extent to which the Fourth Amendment protects people's telephone conversations from unreasonable searches and seizures.

Between November of 1992 and May of 1993, numerous telephone conversations took place between Thomas Ruskin and Gary Lowery. Each conversation related to Ruskin's purchase of discounted airline tickets, as arranged by Lowery. Each conversation was intercepted and tape-recorded by one of Lowery's neighbors, Henry Volentine,[1] using a Bearcat electronic scanning device. Ruskin always talked on a traditional land-based telephone. Unknown to Ruskin, Lowery talked on a cordless telephone. Volentine's Bearcat scanner intercepted

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[1] The trial court held that Henry Volentine was acting as a government agent when he intercepted and recorded the telephone conversations in question. The Government challenged this finding on appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals did not reach this issue, having determined that Thomas Ruskin did not have a reasonable expectation of privacy in his telephone conversations.

the telephone signals that were carried by radio waves between the cordless handset and the base unit of Lowery's telephone. Neither Ruskin nor Lowery knew their conversations were being intercepted, and neither of them consented to the eavesdropping on their conversations. No search warrant or intercept order was ever sought or obtained authorizing the interception, recording, or dissemination of the telephone conversations.

Thomas Ruskin was indicted on one count of conspiracy to commit wire fraud and ten counts of wire fraud alleging violations of 18 U.S.C. §§ 371 and 1343, in the United States District Court, Western District of Louisiana. He filed a *Motion to Suppress*, seeking to prevent the Government from using as evidence at trial the recorded telephone conversations between Lowery and him, as well as all evidence derived therefrom. The trial court conducted an evidentiary hearing on the *Motion to Suppress* on March 11, 1997. See Appendix page D-1.

The Government and Mr. Ruskin entered into a *Stipulation of Facts*, which formed the entirety of the evidence in this case. See Appendix at page E-1. No other evidence of any type, neither testimonial nor documentary, was adduced. That Stipulation provided the following facts.

Lowery's neighbor, Henry Volentine, intercepted telephone conversations between Lowery and Thomas Ruskin between November, 1992 and May, 1993, all without the knowledge or consent of Lowery or Ruskin. In November, 1992, Volentine contacted a deputy sheriff regarding his interception and recording of the Lowery/Ruskin conversations. This same deputy then contacted

FBI Special Agent John Tanza, who then contacted Volentine. Volentine proceeded to play over the telephone for Agent Tanza a tape containing a recorded conversation between Lowery and Jan Leach having to do with what Volentine believed to be the fraudulent acquisition of commercial airline tickets. Agent Tanza contacted Assistant U.S. Attorney Mignonne Griffing and was told by the prosecutor that the interceptions and recordings by Volentine were not illegal. Agent Tanza conveyed the information from AUSA Griffing to Volentine, who continued to intercept and record the Lowery/Ruskin conversations until May 14, 1993. No warrant or intercept order was ever issued authorizing the interception, recording, or dissemination of telephone conversations between Lowery and Ruskin at any time and specifically between the dates of approximately November, 1992 and May, 1993.

Volentine intercepted the radio portion of cordless telephone communications that were transmitted between the cordless telephone handset and the base unit of Lowery's telephone. Ruskin always conversed with Lowery on a hard-wire, land-line telephone and never used a portable or cellular telephone in his conversations with Lowery. Ruskin was never told by Lowery that the latter conversed with him on a portable or cellular telephone and Ruskin never specifically asked Lowery whether or not he was conversing on such a telephone. Lowery states that Ruskin told him to "never talk on a cordless telephone" and indeed confirmed as much in the portion of his grand jury testimony in which Lowery described his various conversations with Ruskin.

On December 14, 1992, Agent Tanza completed FBI forms requesting the New Orleans office of the FBI to

register Volentine as a cooperating witness in connection with an investigation of wire fraud and mail fraud on a national level. The FBI forms designating Volentine as a cooperating witness assigned to Volentine the code name "Caller" and also contained information pertaining to his real name, address, age, physical description, and occupation, in addition to the general nature of the investigation. The form also contained a section having to do with any possible criminal record of Volentine. The New Orleans office of the Federal Bureau of Investigation approved Agent Tanza's request regarding the registration of Volentine as a cooperating witness on January 26, 1993, and assigned Volentine number 5780.

During the period in which Volentine intercepted and recorded the Lowery/Ruskin telephone conversations, he initiated contacts with Agent Tanza on February 11, 1993, February 19, 1993, March 29, 1993, May 12, 1993, May 18, 1993, and June 29, 1993. Two of the contacts involved personal meetings between Volentine and Agent Tanza and the other four contacts involved telephone conversations. In each of the six instances, Volentine provided specific information to Agent Tanza regarding what he and Agent Tanza believed to be a scheme to fraudulently acquire commercial airline tickets. Agent Tanza made detailed notes pertaining to the information provided by Volentine.

Agent Tanza prepared a typed summary of the information provided to him by Volentine at each contact, and Agent Tanza then provided the summaries to the various airlines in an effort to prevent implementation of the suspected scheme. In that regard, he prepared lists of

Lowery's clients and PTA numbers[2] and other related ticket information which he mailed to the airlines. He received oral confirmation from the various carriers in response to that information. Agent Tanza's summaries regarding his six contacts with Volentine were made a part of the *Stipulation of Facts*, and were admitted as Joint Exhibits 1 through 6 respectively. See Appendix pages E-6 – E-26.

Volentine's purpose in intercepting, recording, and divulging the Lowery/Ruskin telephone conversations was to assist law enforcement efforts and he in fact did assist such efforts. Agent Tanza knew throughout the period of the interception of the Lowery/Ruskin calls that Volentine was intercepting and tape recording the private telephone conversations without the consent of Lowery or Ruskin. Agent Tanza provided no guidance nor instructions to Volentine. Following each Volentine/Tanza contact, Agent Tanza knew that Volentine intended to continue intercepting, tape recording, and divulging to the federal government the content of Lowery/Ruskin telephone conversations.

In April, 1993, Volentine turned over to Agent Tanza approximately seventy-three telephone conversations between Lowery and Ruskin which he intercepted and taped beginning in approximately November, 1992 and extending through approximately May, 1993.[3] Volentine

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[2] "PTA Number" means a Pre-Paid Ticket Advice number issued by an airline to a travel agency to confirm the receipt of payment in advance for the purchase of an airline travel ticket.

[3] The *Stipulation of Facts* stated that in April of 1993 Volentine turned over tapes of conversations from November

was paid $750 in cash by Agent Tanza, and Volentine had no knowledge until the payment that he would receive compensation for his services and work product. Agent Tanza turned over all of the tape-recorded Lowery/ Ruskin conversations, which he received from Volentine, to the United States Attorney's office for the Western District of Louisiana, and that information, as well as other information derived from it, resulted in the indictment of Ruskin.

Lowery did not tape record any telephone conversations between himself and Ruskin at any time from November, 1992 through May, 1993, and he did not authorize anyone else to tape record such conversations. Moreover, Lowery did not provide to law enforcement or the government any tape recordings of his conversations with Ruskin occurring between November, 1992 and May, 1993. After May, 1993, Lowery cooperated with the FBI and surreptitiously recorded a number of his conversations with Ruskin and others.

At the conclusion of the hearing, the trial court granted Mr. Ruskin's *Motion to Suppress*. The trial court held that the tape-recordings were obtained in violation of Thomas Ruskin's Fourth Amendment rights. Judge Tucker L. Melancon found that Henry Volentine was acting as a government agent when he intercepted and

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1992 through May 1993. Obviously this was incorrect. It is believed that in April of 1993 Volentine turned over tapes of conversations from November 1992 to date, then met with Tanza at a subsequent time in June 1993 to turn over the rest of the tapes recorded through May 1993.

recorded the telephone conversations in question.[4] The court also found that Thomas Ruskin had a reasonable expectation of privacy in his telephone conversations that society is prepared to recognize. The trial court rejected the Government's argument that Ruskin should have inquired whether Lowery was using a cordless telephone at the beginning of each conversation and also rejected the argument that Ruskin should have anticipated that Lowery might be using a cordless telephone. The court stated:

> such a requirement, [ ] would be limiting Fourth Amendment protections to the extent that no phone conversations, whether on land-based lines or cordless phones, would carry an expectation of privacy because one would be forced to always anticipate that the other party may be using a phone whose technology allows it to be intercepted. Such a requirement would limit society's expectations of privacy and Fourth Amendment protections with every expansion of technology.

See Appendix page C-6. The court found that the governmental intrusion into Thomas Ruskin's privacy was unreasonable under the circumstances of this case, where the government had a reasonable opportunity to obtain a warrant. The government filed a *Motion to Reconsider*, which was denied by the court. See Appendix page B-1.

The Government appealed to the United States Court of Appeals for the Fifth Circuit from the trial court decision granting the *Motion to Suppress*. The Court of

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[4] As noted supra at n.1, the Court of Appeals did not reach this issue and so left undisturbed this holding of the trial court.

Appeals reversed the trial court. The Court of Appeals held that Ruskin failed to carry his burden of showing that his Fourth Amendment rights were violated, "particularly because Ruskin introduced no evidence, such as the phone's frequency or range, that would tend to show that his subjective expectation of privacy was reasonable." See Appendix page A-2. The Court of Appeals also held that interception and tape-recording of the radio portion of a cordless telephone conversation was legal under both the Wiretap Act[5] and the Federal Communications Act[6] between November of 1992 and May of 1993. Based on the foregoing holdings, the Court of Appeals finally held that Ruskin did not have a reasonable expectation of privacy in the telephone conversations at issue.

REASONS FOR GRANTING THE WRIT

This case presents an important issue concerning whether a person can ever have a reasonable expectation of privacy in his telephone conversations because of the possibility that the person to whom he speaks may use a cordless telephone. Petitioner urges that he had a reasonable expectation of privacy in his telephone conversations conducted on a traditional land-based telephone, but where unknown to him the person to whom he spoke used a cordless telephone. The Court of Appeals' ruling to the contrary is in conflict with this Court's decision in

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[5] 18 U.S.C. §§ 2510-2522 (prior to amendment by Pub.L. 103-414, Title II, §§ 202(a), 203, eff. Oct. 25, 1994).

[6] 47 U.S.C. § 605 (prior to amendment by Pub.L. 103-414, Title III, §§ 303(a)(25) to (28), 304(a)(15), eff. Oct. 25, 1994).

Katz v. United States, 389 U.S. 347 (1967), that a person has a reasonable expectation of privacy in his telephone conversations conducted from a public telephone booth. The decision of the Court of Appeals denies Fourth Amendment protection of telephone conversations because of the possibility of someone intercepting the conversations. This violates the holding of *Katz*, that "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Whether a person has a reasonable expectation of privacy in his telephone conversations, when it is possible that the person to whom he speaks uses a cordless telephone, has not been considered by this Court. Because of the prevalence of cordless phone usage in our society, this is an important question of federal law that has not been but should be decided by this Court.

Application of the Fourth Amendment depends on whether the person invoking its protection can claim a reasonable expectation of privacy that has been invaded by government action. *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S. 347, 353 (1967). For the Fourth Amendment to apply, the person must, by his conduct, exhibit an actual (subjective) expectation of privacy and that expectation must be one that society is prepared to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S. 347, 351, 353 (1967).

Two courts of appeals have squarely addressed the question of whether a person had a reasonable expectation of privacy in a telephone conversation where the person invoking the Fourth Amendment used a traditional land-based telephone, but the person to whom he

spoke used a cordless telephone.[7] *United States v. Ruskin*, 97-30477 (5th Cir. 5/14/98), see Appendix page A-1; *In re Askin*, 47 F.3d 100 (4th Cir. 1995). Those courts of appeals have erred in their application of this Court's Fourth Amendment jurisprudence. The Eighth Circuit, however, has suggested in dicta that the user of a traditional telephone does have an expectation of privacy when speaking to a cordless telephone user.

> We note that persons using a standard telephone to speak to a cordless telephone user are generally thought to be protected, because such a person has no reason to know his or her words are being broadcast from the cordless phone user's base unit to a handset.

Tyler v. Berodt, 877 F.2d 705, 707 n.3 (8th Cir. 1989) (citing *Rhode Island v. DeLaurier*, 488 A.2d 688, 694 n.4 (R.I. 1985); *Kansas v. Howard*, 679 P.2d 197, 206 (Kan. 1984)). We suggest that this view comports with the *Katz* decision of this Court.

In *In re Askin*, 47 F.3d 100 (4th Cir. 1995), the user of a traditional telephone claimed that his Fourth Amendment rights were violated when the government intercepted his conversation by intercepting the radio signals between the base and handset of the cordless telephone used by the person to whom he spoke. The Fourth Circuit first decided that the portion of a telephone conversation

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[7] Other courts have addressed related, but different, questions. *McKamey v. Roach*, 55 F.3d 1236 (6th Cir. 1995) (plaintiff user of traditional telephone not entitled to receive damages under Wiretap Act where person to whom he spoke used cordless telephone, even though plaintiff did not know of cordless telephone use).

transmitted by radio signals between the base and handset of a cordless telephone was not an "oral communication" as defined by the Federal Wiretap Act and so was not protected by that Act. The Fourth Circuit then reasoned that the words of both the traditional phone user and the cordless phone user were intercepted between the base and handset of the cordless phone and were not protected by the Federal Wiretap Act. The *Askin* Court believed it would have to declare unconstitutional the statutory exceptions to the Wiretap Act if it found that the traditional telephone user had a reasonable expectation of privacy in the conversation.

> Were we to hold that Askin's end of the cordless communications was constitutionally protected, we would be forced to rule the statutory exceptions of Title III unconstitutional.

In re Askin, 47 F.3d 100, 105 (4th Cir. 1995). The *Askin* Court never applied the Fourth Amendment analysis necessary to determine whether Askin had a subjective or objective expectation of privacy in his telephone conversations. Instead, the Fourth Circuit seemed to hold that the Fourth Amendment protection of telephone calls could not be violated unless the interception of those telephone calls constituted a crime in violation of a substantive statute. The *Askin* opinion does not reveal whether the traditional telephone user was aware that the person to whom he spoke used a cordless telephone.

In this case, the Fifth Circuit held that Thomas Ruskin did not carry his burden of establishing that his expectation of privacy in his telephone conversations was

reasonable. The court emphasized the fact that Ruskin did not present evidence of the frequency or range of the cordless telephone *used by Lowery*. See Appendix page A-2. The stipulated facts, however, establish that Ruskin conducted his telephone conversations on a traditional land-based telephone, and that Ruskin did not know Lowery used a cordless telephone. Under *Katz v. United States*, Mr. Ruskin had both a subjectively and an objectively reasonable expectation of privacy in those telephone conversations. Since Lowery's use of a cordless phone was unknown to and counseled against by Ruskin, it would be nonsensical to expect or require him to adduce evidence of the phone's technological characteristics in order to prove the reasonableness of his expectation of privacy. Since 1967, this Court has held that society accepts as reasonable a person's expectation of privacy in his telephone conversations. *Katz v. United States*, 389 U.S. 347, 352 (1967). Thomas Ruskin did not know a cordless telephone was in any way involved in his conversations, so the only difference between the circumstances here and in *Katz* is the development of cordless phone technology. As the trial court observed, a requirement that Ruskin inquire or anticipate the use by Lowery of a cordless phone,

> would be limiting Fourth Amendment protections to the extent that no phone conversations, whether on land based lines or cordless phones, would carry an expectation of privacy because one would be forced to always anticipate that the other party may be using a phone whose technology allows it to be intercepted.

See Appendix page C-6.

The holding of the Fifth Circuit Court of Appeals that Ruskin must present evidence of the cordless telephone technology in use directly conflicts with this Court's decision in *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the government intercepted the phone calls of the defendant made from a phone booth by attaching a listening and recording device to the outside of the public telephone booth. Were the rationale of the Fifth Circuit correct, then the *Katz* Court would have required Mr. Katz to introduce evidence of the sound-proofing capabilities of the telephone booth from which he conducted his phone calls. Instead, the *Katz* Court rejected the Government's argument that the public nature of a telephone booth precluded a reasonable expectation of privacy. The Court said:

> What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.
>
> . . . No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

Id. at 351-352. Similarly here, to read the Constitution so narrowly as the Fifth Circuit has done, "is to ignore the vital role that the [cordless] telephone has come to play in private communication." This Court should address this important constitutional question of privacy in telephone conversations.

CONCLUSION

For all of the foregoing reasons, petitioner THOMAS RUSKIN respectfully prays that this Court grant the writ of certiorari, reverse the decision of the United States Court of Appeals for the Fifth Circuit denying petitioner's *Motion to Suppress*, and reinstate the decision of the United States District Court, Western District of Louisiana, granting petitioner's *Motion to Suppress*.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 97-30477

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

THOMAS RUSKIN, also known as Thomas Rufkin,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(96-CR-30037-ALL)

Before DAVIS, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

The United States appeals the district court's decision granting Thomas Ruskin's motion to suppress tapes of telephone conversations between Ruskin and codefendant Gary Lowery made by Henry Volentine, a neighbor of Lowery.

The district court found, *inter alia*, that because Ruskin purposely used a land-based phone and had told

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Lowery never to use a cordless phone, Ruskin had an expectation of privacy that society is prepared to recognize as reasonable. The question of whether Ruskin's expectation of privacy was reasonable under the circumstances is a question of law that we review *de novo*. *See United States v. Smith*, 978 F.2d 171, 176 (5th Cir. 1992).

On appeal, the government alleges that Ruskin did not have a reasonable expectation of privacy in these cordless telephone conversations. We agree. In light of all of the circumstances, and particularly because Ruskin introduced no evidence, such as the phone's frequency or range, that would tend to show that his subjective expectation of privacy was reasonable, we hold that Ruskin failed to carry his burden of showing that his Fourth Amendment rights were violated. *See Smith*, 978 F.2d at 180 (explaining that the "trial court must be prepared to consider the reasonableness of the privacy expectation in light of all the particular circumstances and the particular phone at issue"). We reject Ruskin's argument that he had a reasonable expectation of privacy because he was using a hard-wire telephone himself and had admonished Lowery not to use a cordless phone; while Ruskin's admonishment demonstrated Ruskin's subjective hope that his conversations with Lowery would remain private, it actually indicated an awareness of the lack of privacy inherent in such conversations. *See United States v. McNulty (In re Askin)*, 47 F.3d 100, 103-04 (4th Cir. 1995) (rejecting defendant's argument that the court should take a bifurcated view of the communication because the defendant himself was using a traditional wire-based phone, addressing both the Wiretap Act and the Fourth Amendment) (citing *United States v. White*, 401 U.S. 745, 91 S. Ct.

1122, 28 L. Ed. 2d 453 (1971)). Finally, we hold that at the time Volentine taped the conversations, such action was legal under both the Wiretap Act and the Federal Communications Act (FCA), further supporting the government's position that Ruskin had no reasonable expectation of privacy under the Fourth Amendment. *See* 18 U.S.C. § 2510(1), (12) (1993) (expressly excluding from the definitions of "wire communication" and "electronic communication," respectively, "the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit"); *Smith*, 978 F.2d at 175 (holding that the Wiretap Act did not protect defendant's cordless telephone conversations because such communications were expressly excluded from the Act's definitions of "wire communication" and "electronic communication" and because "cordless telephone conversations do not fit within the terms of 'oral communication' "); *Edwards v. State Farm Ins. Co.*, 833 F.2d 535, 538 (5th Cir. 1987) (holding that because Edwards had been determined not to have possessed "a subjective expectation of privacy that was justifiable under the circumstances" with respect to the conversation at issue, no violation of § 605 of the FCA occurred). For the foregoing reasons, we hold that because Ruskin did not have a reasonable expectation of privacy in the telephone conversations at issue, the district court erred in granting his motion to suppress.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

United States of America	Criminal Action 96-30037
versus	Judge Tucker L. Melancon
Thomas Ruskin	Magistrate Judge John F. Simon

ORDER

(Filed Apr. 21, 1997)

Considering the Government's Motion to Reconsider the Court's Ruling granting the defendant's Motion to Suppress, the opposition thereto, the evidence presented at the March 11, 1997 Hearing, and the applicable law,

IT IS ORDERED that the Government's Motion to Reconsider is denied.

Thus done and signed this 18th day of April, 1997 at Lafayette, Louisiana.

/s/ Tucker L. Melancon
Tucker L. Melancon
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

United States of America	Criminal Action No. 3:9630037-01
versus	Judge Tucker L. Melancon
Thomas Ruskin	Magistrate Judge John F. Simon

WRITTEN REASONS FOR GRANTING THE DEFENDANT'S MOTION TO SUPPRESS

(Filed Mar. 12, 1997)

The Court issues the following written ruling in support of its oral ruling granting the defendant's motion to suppress after a hearing conducted on March 11, 1997.

Analysis

The defendant has filed a motion to suppress the audiotapes that contain the recorded telephone conversations between the defendant and Gary Lowery which were recorded by a third-party, Henry Volentine. The government argues that the defendant does not have standing to assert a violation of the Fourth Amendment with regard to these recorded conversations because after Volentine recorded the conversations without the knowledge or consent of the defendant or Lowery, Lowery was confronted by the government with the tapes and agreed to cooperate with the government. As part of Lowery's cooperation with the government, he conceded that he was a party in the taped conversations, pled to a bill of

information, and agreed to the use of the tape recordings by the government. Relying on *United States v. White*, 401 U.S. 745 (1971), and its progeny, the government asserts that Lowery's consent to the use of the tape recordings by the government, after they were recorded, waives Ruskin's standing to assert the Fourth Amendment. However, *White* and its progeny relate to conversations between two parties where one of the parties consents to the recordation of the conversation during or before the conversation. That is not the situation in this particular case. Here, a third-party recorded the conversations without the knowledge and/or consent of either party to the conversation. One of the participants, Lowery, subsequently pled guilty and agreed to cooperate with the government. Lowery's subsequent actions do not validate, or retroactively apply his consent, to the recordings. Accordingly, Ruskin has standing to assert a violation of his Fourth Amendment rights in relation to the taped conversations.

The proponent of a motion to suppress has the burden of proving, by a preponderance of the evidence, that the evidence in question was obtained in violation of his Fourth Amendment rights. *United States v. Smith*, 978 F.2d 171, 176 (5th Cir. 1992). In order to show a Fourth Amendment violation, the defendant must establish several factors. First, the defendant must show that a "government activity" intruded upon a "reasonable expectation of privacy" in such a significant way that the activity can be called a "search." *Id.* Contained within this factor are several elements. Particularly, the defendant must show "government activity."

In this case, the conversations were intercepted and recorded by a private party, Henry Volentine. Volentine was a neighbor of Gary Lowery, the party to whom the defendant was conversing. Volentine intercepted and recorded telephone conversations between Ruskin and Lowery without their knowledge or consent.

A private party is considered an "agent" of the government for Fourth Amendment purposes if the government knew of and acquiesced in the intrusive conduct, and if the party performing the search intended to assist law enforcement efforts or to further his own ends. *United States v. Pierce*, 893 F.2d 669, 673 (5th Cir. 1990).

In this case, after intercepting a conversation between Ruskin and Lowery in November 1992, Volentine contacted a deputy sheriff regarding the interception. This deputy contacted FBI Special Agent John Tanza who then contacted Volentine. Volentine played a recording of an intercepted conversation between Lowery and another party for Agent Tanza over the telephone. Agent Tanza contacted the Assistant United States Attorney to determine the legality of Volentine recording the conversations and was informed that it was legal. Agent Tanza conveyed this information to Volentine who then proceeded to intercept and record telephone conversations between Lowery and Ruskin from November 1992 until May 1993.

During the period in which Volentine intercepted and recorded the telephone conversations between Lowery and Ruskin, Agent Tanza was in periodic contact with Volentine. During these contacts, Volentine informed Agent Tanza about the specific details of the conversations. Agent Tanza prepared typed summaries of the

information provided by Volentine at each contact and provided these summaries to various airlines in an effort to prevent the activity discussed in the telephone conversations.

Based on these facts, it is clear that the government knew that Volentine was intercepting and recording the telephone conversations and acquiesced to Volentine's activities. Volentine clearly intended to assist law enforcement efforts by intercepting and recording the telephone conversations, and did in fact do so. Therefore, Volentine was acting as a government agent when he intercepted and recorded the telephone conversations in question.

The key inquiry in this particular case is whether the interception of Ruskin's phone calls constituted a "search" within the meaning of the Fourth Amendment. A search occurs when the government infringes an expectation of privacy that society is prepared to consider reasonable. *Smith*, 978 F.2d at 177. A subjective expectation of privacy does not, by itself, give rise to Fourth Amendment protection. *Id.* The expectation of privacy must be one that society is prepared to recognize as reasonable. *Id.*

When considering telephone conversations, particularly cordless telephone conversations, many factors including the actions of the parties impact the determination about whether an expectation of privacy is reasonable. *Id.* When the conversations that are intercepted are oral, as they were in this case, section 605 of the Communication Act comes into play. *Edwards v. States* [sic] *Farm Ins. Co.*, 833 F.2d 535, 538-39 (5th Cir. 1987). Section 605 makes unlawful the interception and divulgement of an

"oral" radio communication if, and only if, the speaker held a subjective expectation of privacy that was justifiable under the circumstances. *Id.* at 540. Thus, depending on Ruskin's subjective expectations and the circumstances, Ruskin's expectation of privacy may find objective support from section 605.

It is true that the right to privacy in a personal conversation is generally a reasonable expectation. *Smith*, 978 F.2d at 177. Furthermore, the Fourth Amendment clearly protects communications carried by land-based telephone lines. *Id. citing Katz v. United States*, 389 U.S. 347 (1967). However, certain types of cordless phones, i.e. ones whose frequency makes monitoring easy, do not meet Fourth Amendment privacy standards. *Smith*, 978 F.2d at 179. In light of these considerations, this case presents an unusual situation.

Here, the defendant Ruskin, was using a land-based telephone. In fact, Ruskin always used a land-based telephone in order to prevent interception of his conversations. The other party to the conversations, Lowery, was the party using a cordless phone which made the conversations accessible through interception. Lowery was using a cordless phone even though Ruskin had previously told Lowery never to use a cordless telephone when talking to him. Neither Ruskin nor Lowery had knowledge of the interceptions or consented to them. Thus, even though Ruskin purposely used a land-based telephone, and told Lowery to use a land-based telephone, and neither party consented to having their conversations recorded, a third-party, Volentine intercepted and recorded the conversations because Lowery was

using a cordless phone and these conversation [sic] are now being used against Ruskin.

Under the particular facts of this case, the Court finds that Ruskin had a reasonable expectation of privacy that society is prepared to recognize. The government argues that Ruskin should have inquired about whether Lowery was using a cordless phone at the beginning of each conversation and thus, should have anticipated that Lowery may be using a cordless phone despite Ruskin's previous warnings against it. The Court does not accept this burden as necessary for Ruskin to invoke the Fourth Amendment protections in this instance given the particular facts of this case. If the Court were to recognize such a requirement, it would be limiting Fourth Amendment protections to the extent that no phone conversations, whether on land-based lines or cordless phones, would carry an expectation of privacy because one would be forced to always anticipate that the other party may be using a phone whose technology allows it to be intercepted. Such a requirement would limit society's expectations of privacy and Fourth Amendment protections with every expansion of technology. Accordingly, the Court finds that Ruskin has met his burden of proving that he possessed a reasonable expectation of privacy that society would recognize.

The defendant having demonstrated that a government activity intruded upon a reasonable expectation of privacy in such a significant way that the activity can be called a search, the remaining inquiry is whether the government intrusion was unreasonable given the particular facts of the case. *Smith*, 978 F.2d at 176. Here, the

government acquiesced to and conducted law enforcement activities based on telephone conversations that were recorded from November 1992 until May 1993. The government had reasonable opportunity to obtain a warrant or even investigate into the parties expectations of privacy based on the circumstances. Accordingly, the Court finds that the government intrusion was unreasonable given the particular facts of this case.

The government asserts, however, that it acted with good faith and that under *United States v. Leon*, 468 U.S. 897 (1984), there is a good faith exception to the exclusionary rule which should apply to this case. Under *Leon* and its progeny, a good faith exception to the exclusionary rule was made applicable to those instances where a warrant was obtained, but was later found to be invalid. That is not the case here. In this case, the government never sought to obtain a warrant, even though probable cause to obtain a warrant, based on the stipulations of the parties, clearly existed at the time. The *Leon* good faith exception is not applicable to this case.

For the foregoing reasons the defendant's motion to suppress is granted.

Thus done and signed this 12th day of March, 1997, at Lafayette, Louisiana.

/s/ Tucker L. Melancon
Tucker L. Melancon
United States District Judge

APPENDIX D

[p. 1] UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA	*	Docket No. 96-30037-01
	*	March 11, 1997
VERSUS	*	10:00 a.m.
THOMAS RUSKIN	*	Lafayette, Louisiana

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REPORTER'S OFFICIAL TRANSCRIPT OF HEARING ON MOTION TO SUPPRESS

(Filed March 27, 1997)

BEFORE THE HONORABLE TUCKER L. MELANCON
UNITED STATES DISTRICT JUDGE

COURT REPORTER:
Connie S. Ezell, RPR, CM
P.O. Box 3034
Lafayette, Louisiana 70502

Proceedings recorded by mechanical stenography, transcript produced by computer.

[p. 2] APPEARANCES

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[p. 3] THE COURT: Morning. Be seated.

MS. LEVARDSEN: Good morning, Your Honor.

THE COURT: Before the court today is Criminal Action Number 96-30037, United States of America versus Thomas Ruskin. The matter before the court is a motion to suppress certain tapes filed by the defendant.

At this time, I would ask that the attorneys involved in this case, starting with the Assistant United States Attorney representing the government, to identify themselves for the record.

MS. LEVARDSEN: Thank you, Your Honor. Martha Levardsen representing the government.

MR. SMALL: Good morning, Your Honor. Mike Small representing the defendant Thomas Ruskin who is seated to my right.

THE COURT: First let me just say, the court has conducted, it seems like, two but at least one telephone conversation – well, several conversations, I know that, regarding this case in addition to the pretrial conference that was conducted by telephone. Now, this motion was discussed with the attorneys, and I will say based on the conversations before I had the opportunity to read the filings that were made in connection with the motion, I was not overly impressed with the motion, just based on what the lawyers told me. I took it, and I could be wrong, and I [p. 4] don't want to speak for the government, that the Assistant United States Attorney representing the government in this matter, while she might not have thought it was a no-brainer, it wasn't a big deal. After reviewing the documents, I consider it a very serious

motion, and I'll be interested to see, in light of the stipulations that have been entered into by the parties so that we didn't have to call what I perceive to be a number of witnesses today, how that plays out.

And, for the record, I received a fax copy of the stipulations that were entered into between the government and the defendant, and I think there were twenty-four stipulations that Mr. Small and Ms. Levardsen signed. Had that original been filed in the record of this proceeding?

MR. SMALL: May I address the court?

THE COURT: You may.

MR. SMALL: Should I approach the podium?

THE COURT: You should.

MR. SMALL: Your Honor, after arriving at court this morning, Ms. Levardsen pointed out to me that there were three more or less housekeeping changes that needed to be made in the stipulation. If I could at this time refer the court to those. They're one-word alterations without any significant change in the stipulations, and they appear at Page 8 – I'm sorry, Paragraph 8, and the change there [p. 5] simply involves striking the last word mailings. We have done that and inserted in its place the word information, and Ms. Levardsen and I have initialed the change.

THE COURT: Is that correct, Ms Levardsen?

MS. LEVARDSEN: That's correct, Your Honor.

THE COURT: All right.

MR. SMALL: The next, Judge Melancon, appears at Paragraph 10 of the stipulation where we struck the last word Lowery and substituted in lieu thereof the word – the name Volentine, and we've both initialed that change.

THE COURT: Is that correct, Ms. Levardsen?

MS. LEVARDSEN: That's correct, Your Honor.

THE COURT: All right.

MR. SMALL: Finally, Your Honor, Paragraph 21 of the stipulation involves the striking of the word or at the end of the first sentence and the words cellular telephone, the first two words of the second sentence. We've struck through that on the original we propose to file, and we've both initialed the strike-throughs.

THE COURT: Is that correct, Ms. Levardsen?

MS. LEVARDSEN: That's correct, Your Honor.

MR. SMALL: With those minor deletions to make the original completely accurate, we have signed the original and would at this time move to file it with the court along with Defendant's Exhibits 1 through 6 that were referenced [p. 6] in Paragraph 9 of the stipulation.

THE COURT: And those, if I recall from Paragraph 9, were the actual notes that Agent Tanza took when he interviewed Mr. Volentine?

MR. SMALL: That's correct. On six occasions after Mr. Volentine commenced his taping, two by way of personal meetings, four by telephone conversations, he

conveyed substantive information regarding his intercepts to Mr. Tanza, and Tanza proceeded to prepare summaries based upon each of his six contacts, both telephonic and personal. Defendant's Exhibits 1 through 6 are the summaries of each such summarization by Agent Tanza, and they were provided to me, of course, by the government in response to discovery, Your Honor.

THE COURT: Is that correct, Ms. Levardsen?

MS. LEVARDSEN: That is correct, Your Honor.

THE COURT: And those filings were anticipated with this stipulation, particularly Stipulation Number 9?

MR. SMALL: That is correct.

Is that your –

MS. LEVARDSEN: Yes.

THE COURT: Okay, you may –

MR. SMALL: I'll produce those at this time.

THE COURT: Now, Mr. Small, while you're up there, I had a question, and I wanted to know how Section 605 of [p. 7] the Communications Act comes into play with the radio portion. Help me with how that works in 605, what you say it means and what the Edwards case and all that means.

MR. SMALL: May I return to the table to get –

THE COURT: You may.

MR. SMALL: I should have brought it up initially, but I didn't.

Your Honor, I confess that because I'm not particularly versed in things dealing with radio transmissions and the like that the cases dealing with 605 and its interplay with the Wiretap Act are to me a very convoluted reading, and they're cases that I have to read a number of times before I feel that I have an understanding for them, but I'll try to, as briefly as possible, illuminate my understanding at least of the interplay of the Federal Communications Act, 47, Section 605, with the Federal Wiretap Act, 18 USC, 2510 et seq., and the effect or relationship of both of those statutory enactments as regards the interception of cordless telephone conversations.

As I read the law, the cases that come into play in Your Honor's circuit are essentially four. There are the two Edwards cases, Edwards v. Bardwell and Edwards versus State Farm Insurance, and then by adoption of the latter case State versus Rose, which was a Ninth Circuit case, and, [p. 8] finally, U.S. versus Smith.

Starting with the first Edwards case, these being Louisiana cases involving well-known Louisiana political players, we're somewhat familiar with what happened in the Edwards case back in 1986. Marion Edwards, the brother of the former governor, was conversing with his then criminal attorney, Jack Martzell, in New Orleans. Mr. Edwards conversed on his car phone with his attorney with whom he spoke on a land line phone from his office in New Orleans. The phone conversation between Edwards and Martzell was intercepted by a gentleman in Baton Rouge via a Bear Cat scanner, much like the one that we've stipulated was at use in this case. Mr.

Edwards, after the – after the conversation was intercepted, the interceptor made it available to U.S. Attorneys, one of whom ultimately made the interception known to Jack Martzell who then made it known to Mr. Edwards. Edwards filed suit, the first suit claiming that the interception of his telephone conversation with his lawyer was a violation of the Federal Wiretap Act. That's the Title 18 provisions, 18, 2510 through 2521.

Judge Parker in Baton Rouge heard that lawsuit, and after discussing the nature of radio – of car telephone transmissions and likening it to a radio broadcast concluded that the conversations at issue were not wire conversations but rather were oral communications as to which there was no [p. 9] expectation of privacy. Oral communications are defined in Section 2510, Subpart 2 to be oral communications as to which there is a subjective expectation of privacy, which subjective expectation is objectively reasonable.

Judge Parker concluded that since there was no reasonable expectation of privacy because the calls were broadcast out via radio waves, 2510 was simply not implicated.

The important holding of the case is that it is not a wire communication. As Judge Parker pointed out in his opinion, had it been a wire communication, it would have been covered, because all of them are prohibited from interception, irrespective of expectation of privacy.

Now, Edwards filed another lawsuit. He filed a suit in state court which was eventually transferred to federal court claiming a violation not of the Wiretap Act but of the FCA, the Federal Communications Act, Title 47.

That act essentially says that no person shall intercept a radio transmission without the permission of the sender, and he says since that clearly falls within the prohibition, since the court said my conversations with Mr. Martzell over my car phone to his land line was radio, then 605 is implicated.

The second Edwards opinion then goes on to determine whether or not 605 was indeed implicated. The [p. 10] bottom line holding of the second Edwards case is that 605 was not implicated. They reached that conclusion by saying that it was an oral transmission carried by radio, but after the 1968 enactment of Title 3 which amended 605 and enacted the wiretap statute, the court held that radio transmissions were precluded from interception only if there was a reasonable expectation of privacy, and the Fifth Circuit said since we have already held in the first Edwards case that there was no reasonable expectation of privacy, then – and since we ingrained that expectation into 605 after the 1968 amendment, you also lose on the 605 claim.

Now, that's my understanding of where things stand as regards 605. I think we have to concede 605 as interpreted by the Fifth Circuit in Edwards II which adopted the Ninth Circuit's Rose opinion holds that 605 is implicated – 605 still prohibits the interception of cellular phone calls via radio transmission if there is a reasonable expectation of privacy. That is, in my mind, clearly the holding of Edwards II.

Now, that brings us up, logically, I think, to the last case in the four that I mentioned as being particularly relevant for our purposes, and that is the Fifth Circuit

case, the 1992 decision, in U.S. versus Smith. Smith did not interpret 605, but its language, I think, is extremely important, at least in my analysis of the issue before Your [p. 11] Honor.

Smith dealt with a situation where one neighbor, a man named Varing, suspected Smith of having been involved in the burglary of Varing's home. Varing knew that Smith, the person he suspected as being a burglar, used a cordless phone, and a friend of his recommended that Varing eavesdrop on Smith's cordless phone conversations via a scanner of some sort, and he did, and he didn't learn that Smith was a burglar, but he learned he was a dope dealer. He then goes to the Port Arthur police who tell him, listen, record, tape, and they even provided him with some blank cassettes. He did tape, he recorded, and he overheard and recorded conversations having to do with drug trafficking.

Smith went to trial on those cases and was convicted, and over his objection the tapes of the conversations were introduced into evidence, and he sought to suppress them on two grounds, Fourth Amendment as having violated his reasonable expectation of privacy under Katz, and on Title 3, the wiretap provisions of Title 18, 2510 and following.

The Smith court found in reliance on Edwards II that it was not – that the conversations were not an oral statement protected by the Wiretap Act, but they said – and the interesting part of Smith for my purposes is their lengthy, lengthy discussion regarding the expectation of

[p. 12] privacy in connection with their disposition of the Fourth Amendment claim, because there they had to determine whether or not Smith, who was the proponent of the suppression, had a reasonable expectation of privacy as regards his cordless phone conversations, and they said – they went at great length to discuss why the court had to look at the issue of reasonableness in the context of each case, and in their opinion that I cited in our briefs, they said they went to those great lengths because the trial court was of the mistaken notion that there could never be an expectation of privacy with cordless phones, and the appellate court's opinion was explicitly to disabuse trial courts of the notion that the use of a cordless phone is the sine qua non of the absence of expectation of privacy, vis-a-vis cordless phones. They talk about the evolving technology with the use of cordless phones. They talk about the fact that at the time of the Smith opinion in 1992 almost half of all phones are cordless and the Draconian notion that if we say that there is never a reasonable expectation of privacy with cordless phones, we're going to give up all expectations of privacy in this country, because you never know when you're talking on a cordless phone –

THE COURT: So you say the Fifth Circuit says in that instance, district judge, go ahead, make your inquiry as to the facts of the case, as to the technology involved [p. 13] in the particular phone and surrounding facts, not just limited to technology?

MR. SMALL: Yes, that's my understanding of the Smith holding is that you have to look at the facts of each case.

And I think the critical thing –

THE COURT: They go on to say that's so obvious we didn't need to say it but we're saying it anyhow, or something like that.

MR. SMALL: They say it's obvious that the use of a cordless phone does not end the inquiry, because the district court – and I've never read the district court's opinion. I don't know if it's even published. The district court's opinion obviously had ruled either implicitly or explicitly that use of a cordless phone is tantamount to no expectation of privacy, and the Fifth Circuit says no way, that's not what we're saying at all.

And interestingly, Judge, I thing it's important to remember how we got to the expect – first of all, let me backtrack a bit.

I would point out to the court two things, one thing that is, in my mind, critical, critical, in distinguishing Ruskin's case from either Smith or Edwards II – either of the Edwards cases. Both Edwards cases dealt with the identical phone conversation. In Edwards and in [p. 14] Smith, the person seeking to suppress the conversations himself elected a cordless phone as his mode of communication. Edwards picked up a cordless phone and called Martzell. Smith picked up a cordless phone and dealt with the other end of his drug distribution conversationalist. It was they who sought to suppress the mode of communication they had chosen.

In this case, as the stipulation points out, Mr. Ruskin never used a cordless phone. He always used a land line phone, and indeed the stipulation suggests that he

assumed his partner did, that he assumed his partner in conversation did, because he told him, as Mr. Lowery testified in the grand jury, never to speak on a cordless phone.

THE COURT: Now this grand jury testimony, I'm sure this is the case, but I want you to tell me that and Ms. Levardsen to comment and the record to clearly reflect, grand jury testimony comes about, these folks are all indicted at the same time. There are several defendants, Lowery being one I know just entered a plea in this case. Were they all indicted at the same time?

MR. SMALL: They were not all indicted at the same time. They were all eventually indicted. There were a number of different indictments in this case.

THE COURT: But this indictment for this defendant [p. 15] in this case, for Ruskin, is how old?

MR. SMALL: September 19, 1996 is the date of Ruskin's indictment.

THE COURT: And the Lowery indictment?

MS. LEVARDSEN: Mr. Lowery pled to a Bill of Information, Your Honor.

THE COURT: Well, I'm confused on that, because we saw Mr. Lowery so many different times.

MS. LEVARDSEN: I understand, Your Honor.

THE COURT: I don't recall that now.

MS. LEVARDSEN: Yes.

THE COURT: Okay. But the Lowery grand jury –

MS. LEVARDSEN: Testimony, Your Honor, was regarding the telephone conversations between Mr. Lowery and Mr. Ruskin solely.

THE COURT: I'm getting Mr. Lowery confused right now with Mr. –

MR. SMALL: Volentine?

MS. LEVARDSEN: Mr. Noel?

THE COURT: Mr. Noel, that's correct. And Mr. Lowery actually entered a plea, Ms. Levardsen. How far back was this?

MS. LEVARDSEN: He was sentenced last spring in 1996. His guilty plea was the prior year, Your Honor.

THE COURT: And his grand jury testimony was clear [p. 16] that this defendant, Ruskin, told him, use a land based telephone only?

MS. LEVARDSEN: Yes, yes. In discussing all the conversations that they had, that was part of the conversation.

THE COURT: And this is what he tells the grand jury when he goes up there the first time?

MS. LEVARDSEN: Yes.

THE COURT: Okay.

MS. LEVARDSEN: In addition to describing the other conversations.

THE COURT: All right. Go ahead, Mr. Small.

THE COURT: So, as I said, that is the critical distinction between Smith, Edwards and Ruskin.

What the Fifth Circuit said in Smith is that we give you this, Mr. Smith. They say, and I quote briefly from Page 180, "Although we express no opinion as to what features or circumstances would be necessary to give rise to a reasonable expectation of privacy, it should be obvious that as technological advances make cordless communications more private, at some point such communications would be entitled to Fourth Amendment protection. Given this conclusion, it should be equally obvious that it is not enough for a trial court to conclude that interception of a conversation does not implicate Fourth Amendment concerns [p. 17] simply because it is carried on a cordless phone."

And they went on to say since Smith chose the cordless, it was incumbent upon Smith to show the reasonableness of his expectation, and he failed to carry that burden. He didn't have, for example, the evidence that Mr. Ruskin has presented by way of stipulation about which you just sought clarification regarding his having told the other end of his conversation to always speak to him on other than a cordless phone.

I think that's important because – it's important, because when Edwards II rendered its ruling – when the Fifth Circuit rendered Edwards II, it did so by specifically, by name, adopting the Ninth Circuit opinion in U.S. versus Rose.

Reading of the Rose opinion is illuminating, in my mind. The opinion in Rose went to very, very fact intensive lengths to determine whether or not in the first

instance Rose had an expectation of privacy, vis-a-vis the conversations.

Now, the conversations in Rose were on ham radio, one ham to another ham, and they were dope dealers, and – but here are the type things the court considered in the first instance to determine whether Rose had a reasonable expectation of privacy. They looked at the fact that he switched frequencies when he was dealing with his [p. 18] conversational counterpart. They looked at the fact that Rose – neither Rose nor his counterparts I.D.'d the particular stations they were on as required by the FCC. They alluded to the fact that neither Rose nor his counterparts identified themselves on the conversation as they were required to by FCC regulations, and they alluded to the fact that they used code to disguise the content of their conversations.

The Ninth Circuit went on to hold that because it was so obvious that they knew they weren't on secure lines, it's obvious that they had not even a subjective expectation of privacy, but that's the type inquiry the court went into in Rose and Edwards II. The Fifth Circuit adopted Rose's approach by name. They specifically adopted the holding of Rose.

If you go through a similar fact-intensive inquiry in this case, where does it lead you regarding the objective expectation? One, since Katz, it has been undisputed, and Katz specifically holds, that land line telephone conversations are secure and interception of them without a warrant implicates the Fourth Amendment because it invades a reasonable expectation of privacy.

Now, so where does that lead us? We have a stipulation that Mr. Ruskin always conversed with Lowery on a land line phone, told Lowery to do the same, and he was [p. 19] never disabused of the notion, all per the stipulation, Judge, that he was conversing on a land line phone with his conversational counterpart.

If this court, as I think you're required to do, employs the fact-intensive inquiry as regards the expectation of privacy, I think the stipulation leads you inevitably to the conclusion that Mr. Ruskin had that expectation, and it seems to me that the conclusion is almost inescapable in view of the stipulation, and that is the basis on which we think this case is clearly distinguishable.

This is the case – all lawyers want to say this is the case that that case contemplated, and we overuse that perhaps, but it seems to me that the very thing the Smith court was concerned about and addressed at length in its 1992 opinion is now confronted to a state district court judge in Lafayette where you have those expectations of privacy.

We don't have to show the technological aspects of the cordless phone Lowery was using because we didn't know Lowery was using it. On the contrary, we had every reason to assume he was not.

Now, if – but what Smith says is that even if Ruskin had used a cordless phone, under Smith, he would be allowed to come in and show why he felt he had privacy even [p. 20] as to that mode of communication. We don't have that situation here because he never used it, and we think that's what distinguishes us from the cases that have rejected it.

THE COURT: I want you to stay up there, Mr. Small.

But that sure seems like where we are to me, Ms. Levardsen, as far as, okay, under Smith show us why in this instance under the facts of this case that you had a reasonable expectation of privacy. It seems like that's where Smith gets us today and me today.

Mr. Small, but Smith is Fourth Amendment, right?

MR. SMALL: Smith is Fourth Amendment, but the cases indicate that the analysis of expectation of privacy for Fourth Amendment and 605 are virtually identical.

THE COURT: I understand that. But I'm still not clear as to 605, and, of course, I suppose that you'd like to see if you could waive a wand as to both of them in this instance.

MR. SMALL: I think that the logical – oh, yes, Yes, sir, absolutely.

THE COURT: But what I'm saying, I'm not – I see where you're going on Fourth Amendment. I'm not sure if I see where you're going on 605. That's why I got you up here in the beginning and asked you that question.

MR. SMALL: Okay. 605 clearly, under Edwards II, [p. 21] applies to cordless phone conversations under the explicit holding of Edwards II if the cordless conversation is a communication as to which there is a reasonable expectation of privacy. That's what Edwards II holds. So if Ruskin's cordless conversation is one attended by a subjective expectation of privacy that you find to be

reasonable, then 605 is violated. I mean, it's undisputed that 605 applies if there's a reasonable expectation.

THE COURT: Ms. Levardsen, let me ask you this question. Assuming that I find a reasonable expectation of privacy, do you agree with Mr. Small's characterization as to how that relates to 605? Assume for the answer to the question reasonable expectation of privacy found. Fourth Amendment sits out there. What about 605?

MS. LEVARDSEN: Your Honor, our position is that 605 applies only if the Title 3 doesn't apply, the wiretap statute, 18 USC. That's what the Edwards case says. The Fifth Circuit held that unless the communication also falls within the protections of the Wiretap Act, then the communication doesn't fall within the protections of the Federal Communications Act, period. And our point is that it doesn't fall under the Title 3 –

THE COURT: So your position, the government's position, is that if I find there was a reasonable expectation of privacy on the facts of this case, 605 still [p. 22] just doesn't apply?

MS. LEVARDSEN: That's correct, Your Honor.

THE COURT: Mr. Small?

MR. SMALL: Judge, I can lay that to rest by quoting – I'm surprised that that's the position. That, to me, is absolutely a given. At Page 538 of Edwards II, this is the rule of Rose adopted by the Fifth Circuit:

In Rose, the First Circuit concluded that while the Communications Act still applied to oral communications transmitted by radio waves after the enactment of the

Wiretap Act, such communications were protected by Section 605 only if the speaker possessed a subjective expectation of privacy that was objectively reasonable.

I submit that that's not even debatable. If we read – and this – and they go on to say, we adopt that reasoning. I mean, that is – I think is clear as a bell. If you find under the Smith analysis that there was a reasonable, subjective expectation of privacy, I don't think there is even a slight question that 605 is implicated. The reason Edwards didn't cover it is because they didn't find a reasonable expectation of privacy because Edwards chose a cordless phone. He selected it. But, Judge – and that quote comes from Page 538 of the Edwards opinion.

THE COURT: Ms. Levardsen, I have to assume that Mr. Small has correctly read the quote he attributes to [p. 23] Edwards II at Page 538. I recall over the last couple of days having reviewed that case. What's your response to what he just said?

MS. LEVARDSEN: He mentioned cordless phones, and in that case it was a cellular phone, a telephone – mobile phone which is a cellular phone and not a cordless phone, Your Honor.

THE COURT: Well, besides the technology and the import that that might bring to bear in this case, what's the difference as far as the effect of the analysis? Tell me – you're saying the technology makes one of them easy to record and the other one not easy to record, or what's the point?

MS. LEVARDSEN: At the time, the cellular was not covered, Your Honor, by the Wiretap Act, nor was the

cordless telephone at that time. Later they were covered. The court found no reasonable expectation of privacy by Mr. Edwards in the type of phone that he used.

THE COURT: But had they found the reasonable expectation of privacy, that's the point, that's the question, then 605 applies?

MS. LEVARDSEN: I'm not sure, and I'm not going to second guess the Fifth Circuit in 1987, Your Honor. They didn't hold that way.

THE COURT: I never want to second guess the Fifth [p. 24] Circuit if I can help it.

MS. LEVARDSEN: I understand, Your Honor.

THE COURT: Okay. All right. Well, let's proceed – let's start it out with your response to my question, Mr. Small. Proceed in whatever fashion you originally intended to proceed.

MR. SMALL: Your Honor, I actually think that I have pretty much covered the most salient points that go to the issue before the court. And I would just by way of conclusion – and I'm glad you asked the questions you did because it caused me to address most of the points that I think are dispositive of this issue that is before you now.

The facts in evidence which are before you in the way of a pretty clean, hopefully orderly stipulated presentation in my mind clearly show that there was a reasonable expectation of privacy on Mr. Ruskin's part. It's undisputed, and I think there aren't going to be many cases. I don't think like this – first usually you have the cordless user who comes in to suppress. Here you have the land

line user. I've never had a situation where the cordless user acknowledges having discussed the desirability of not using cordless phones but land line phones. You have that factor here.

The only other thing – and under the Smith analysis which – and, incidentally, the Smith analysis that [p. 25] goes to what district courts have to do to determine the expectation of privacy is essentially at Page 180 and following of that opinion.

The only other topic that –

THE COURT: Well, I think Ms. Levardsen has acknowledged, and I don't want to speak for her right now, you correct me if I'm wrong, in response to an earlier question that that's where we are today. That's what this is about, this detailed analysis of the facts of this case. We all agree that's what a district judge is supposed to do, right? Ms. Levardsen nods yes.

MR. SMALL: I think that's clearly where we are.

The only other topic that I did not touch on because it wasn't responsive to your initial question deals with something that is also addressed at great length, incidentally, by the stipulation, and that is whether or not Mr. Volentine, in intercepting the Lowery/Ruskin phone conversations, acted as an agent of the government for purposes of the intercept, and we have cited the case law to the court that we think is dispositive of that issue as well.

The cases that control that issue, Judge, are the Fifth Circuit cites that we've made to the court and also – those are Pierce, Bazan and Jenkins. And by way of adoption

what the Fifth Circuit does in determining whether or not [p. 26] the actions of a private citizen constitute government actions for purposes of the Fourth Amendment is to look at two things, and this is set out in the case of U.S. versus Walther at 652 Fed. 2d, 788, a Ninth Circuit opinion, 1981, and the Fifth Circuit in all of their cases, Pierce, Bazan and Jenkins, refer to the Walther test. It has essentially two components. The court looks first to, one, whether the government knew of or acquiesced in the conduct and, two, whether the party performing the search intended to assist law enforcement or his own private ends.

To me, this issue is virtually a no-brainer. I mean, it is patently clear that Mr. Volentine, for purposes of Fourth Amendment analysis, operated as an agent of the government. The operative facts in Walther were that an airline employee for a number of – a period of time opened packages with the knowledge of the DEA. He opened what was known as speed packs, and from time to time he found dope in them, and he would report that to the DEA. He received a total of eight hundred dollars over a two- or three-year period, and the question in this case was whether or not for purposes of Fourth Amendment analysis the court should view the airline employee in Walther as a government agent so as to implicate the Fourth Amendment.

After articulating the Walther test, which is adopted by the Fifth Circuit, they concluded that he clearly [p. 27] was, and at Page 793 of the Walther opinion they made two findings. One, the DEA encouraged this type of search, even though not this particular search; and, two,

the DEA had knowledge of the particular pattern of search.

Here what we know is that Volentine initially, sometime in November of 1992, went to a state law enforcement officer and told him that he had overheard conversations that he thought were perhaps criminal. The state agent then went to a Mr. Tanza, an FBI agent, and related the information to him.

Tanza – and this is all – I'm not speaking out of school. This is in the stipulation. Tanza then called Volentine, the taper, and Volentine played for Tanza one of the conversations he had intercepted between Lowery and another person, not Ruskin.

Mr. Tanza then apparently took it on himself to go to a colleague of Ms. Levardsen's, Ms. Griffing, an Assistant U.S. Attorney in Shreveport, and related the interception by Volentine of the Lowery phone conversations which were admittedly without the knowledge of Lowery and the others, including Ruskin. After researching the issue, apparently the Assistant U.S. Attorney informed Tanza that the interception was not illegal, and Tanza conveyed that information to Mr. Volentine. Volentine continued to tape then for a period of approximately seven months, from [p. 28] November of '92 through May of '93.

Significantly for the agency question is the fact that we referenced at the beginning that Volentine, on at least six occasions after he had been given a thumbs up as regards the legality question, contacted Mr. Tanza and conveyed detailed information to him, all of which is summarized in Defense Exhibits 1 through 6 that were submitted in connection with Stipulation Number 9. That

information related to specific ticket purchases, specific PT numbers, prepaid ticket numbers, specific airlines and was very detailed and substantive in nature.

Tanza, therefore, received the information, but he did more than that, he acted on it. He contacted the various airlines with a view to attempting to stop the fraudulent acquisition – or prevent the fraudulent acquisition of airline tickets, and he met and conversed with him throughout this process.

Finally in about May of 1993, Volentine goes to Tanza and turns over approximately, as relevant here, seventy-three recorded conversations between himself and my client, at which time he was paid seven hundred and fifty dollars, which had not theretofore been discussed, for his services.

We also stipulated in the document before you that the tapes that Tanza took possession of in May of '93 were [p. 29] subsequently turned over to the U.S. Attorney's office, and it was on the basis of those tapes and derivative information that the present indictment was returned.

THE COURT: Mr. Small, is it your position that this payment of seven hundred and fifty dollars that Mr. Volentine didn't know he was going to receive has what bearing? What is your position on that?

MR. SMALL: The cases say that it does have a bearing. One of the cases found that a person was not an agent, emphasized the fact that he had not – there had been no payment. In my opinion, he wouldn't have made the slightest difference – well, let me put it this way. In

my opinion, even if there had been no payment, clearly Volentine, under the Fifth Circuit case law, is, in my – in my understanding of case law, he's an agent.

THE COURT: So the Walther test doesn't require three things, it requires two things. You say they're met without the payment?

MR. SMALL: Absolutely, absolutely. They're met without the payment. The payment makes it a bit stronger, but had there been no payment, I would be before you arguing with as much certainty as I am now that Volentine was an agent under the Walther test.

Did the government know of or acquiesce in the conduct? If they knew of it, gave a legal opinion – our [p. 30] stipulation also says that after each of the six meetings, Tanza knew that he intended to continue the interceptions without the consent of either party. That's in the stipulation.

It's undisputed that neither Ruskin nor Lowery knew that the calls were being intercepted, so the first phase of the – the first prong of the test to me is clearly met, and the second is whether the party performing intended to assist law enforcement. There is a specific stipulation that that is precisely what Mr. Volentine intended to do in this case, and he stipulated even more, and that is that he did – not only did he intend to assist but he did indeed assist.

THE COURT: Then you talk about in the stipulation about being – registering Mr. Volentine as a cooperating witness?

MR. SMALL: Mr. Volentine in December of –

THE COURT: Stipulation 15, I believe.

MR. SMALL: Yes, sir. And I know it almost without looking at it, but in December of '92, Agent Tanza requested, pursuant to FBI regs, that Volentine be registered as a cooperating witness. That request was approved. He was given a code name. They code named him Caller, C-A-L-L-E-R. They filled out all the forms. I mean, I'll be surprised if there is a spirited argument for [p. 31] the proposition that Mr. Volentine was not an agent. I mean, it seems to me that the two prongs of the Fifth Circuit test articulated in Pierce, Bazan and Jenkins, all of which adopted Walther, are abundantly met in this case.

THE COURT: And Stipulation 6 and 7 say that Agent Tanza had six different contacts with Volentine. Two of them were in-person meetings, is that correct?

MR. SMALL: That is correct.

And also I would hasten to suggest to the court that you peruse the Defense Exhibits 1 through 6. These were were [sic] not sketchy, scant, truncated type 302 documents. These are pithy, substantive, chock-a-block full of facts, reports that Mr. Tanza created after each of the six meetings.

THE COURT: In Stipulation 8, Tanza takes this information, goes to the airlines that are referred to in whatever the tape recordings are to prevent them – or to try to prevent the fraudulent transactions regarding the tickets. That's what Stipulation 8 says.

MR. SMALL: That's precisely what the stipulation says, because that's precisely what occurred.

THE COURT: Okay. Anything else?

MR. SMALL: Your Honor, I think that unless the court has more specific questions, I think that will do it for my –

[p. 32] THE COURT: You had indicated in your motion that you thought it would be necessary to have some live testimony. I understand there are some witnesses here. Is it your position now that with these stipulations you really don't have any testimony?

MR. SMALL: Your Honor, that's correct.

THE COURT: All right. Okay.

Ms. Levardsen, let me ask you, first of all, as it relates – and I want to first of all apologize for me characterizing our telephone conversations – your position in our telephone conversations as no-brainers. Maybe you didn't say that, but that was my word, choice of words. Mr. Small has since used that once on this particular issue, and I have to say that when I read the stipulations, it sure jumped out at me that, gee, is the government going to say this guy wasn't an agent of the government?

Mr. Small, you can be seated.

MS. LEVARDSEN: Thank you, Your Honor. I think sometimes we lose sight of the forest because we're going to a bumpy end to the trees. I stepped back and I looked at the entire forest, and I have a couple of observations and arguments, Your Honor.

As I mentioned earlier, Gary Lowery appeared before the grand jury and offered testimony regarding the conversations between Gary Lowery and Mr. Ruskin, including [p. 33] the statement that Mr. Ruskin had told him don't use a cordless phone, although he never asked Gary

Lowery are you using a cordless phone, and Gary Lowery never assured him that I'm not using a cordless phone.

Be that as it may, Your Honor, a participant to the conversations has come forward and told about those conversations. Gary Lowery has revealed his conversations with the defendant. The defendant then has no standing to complain about or object to the release of any of the conversations. A party has consented to the release.

The complete substance of the conversations is going to be disclosed and discussed at trial and it was so in the grand jury. In that context, the defendant can have no expectation of privacy.

THE COURT: Ms. Levardsen – and I'm trying to recall where it is that that position you've just taken was mentioned in the opposition to the motion we're hearing today and what authority other than, well, everybody knows that if a party participant to a conversation releases it, then it's released and everybody's at risk here.

MS. LEVARDSEN: Your Honor, the authority would be – I'd cite United States versus Jones at 693 Federal 2d, 353 which is a Fifth Circuit opinion back in 1988. I Shepardized it yesterday, Your Honor. It's still good law.

Basically that holds that when one party consents [p. 34] – one party to a conversation consents to the release of the information regarded – or contained in those conversations, then it's well settled law that there is no

expectation of privacy to the conversation, and the defendant lacks standing to challenge the release of those conversations.

And in this case, Your Honor, we point out that the tape recordings, all they are is simply corroboration of what Mr. Lowery is testifying to in the conversations.

Secondly, Your Honor – and, again, I was looking at the entire forest instead of dealing with the individual trees. Even if we concede or the court finds that Mr. Volentine was acting as a government agent, both he, Mr. Volentine, and Special Agent Tanza, the FBI agent, were acting in good faith when Mr. Volentine – when Tanza said it was not illegal and Mr. Volentine went ahead and did the recordings.

Good faith actions make the exclusionary rule inapplicable, Your Honor. And I would cite you to United States versus Leon, 462 United States, 897 and 104 Supreme Court, Page 3405, a 1984 decision. And again, Your Honor, yesterday morning I Shepardized that, and that's still good law –

THE COURT: I'm painfully aware of the Leon case and the, in my view, extension of that case as interpreted [p. 35] by the Fifth Circuit, because I had occasion recently in another matter to reconsider a ruling, but –

MS. LEVARDSEN: I wasn't aware of that, Your Honor.

THE COURT: But, as I recall, after you make the general statement good faith exception, I mean, this is really far afield from even what I perceive to be the extension of the Leon case by the Fifth Circuit, and I've

forgotten the name of that case. It escapes me now. But, at any rate, go ahead.

MS. LEVARDSEN: I would simply conclude on that argument, Your Honor, that Henry Volentine and Special Agent Tanza were acting in good faith at the time the recordings were made. They relied upon on [sic] the information and the research provided them by AUSA Mignonne Griffing that there was nothing illegal about recording telephone conversations which were made over cordless telephones at that time.

And then, Your Honor, dealing with the last issues, under the statutes in effect at the time and the Fifth Circuit case law at the time that these recordings were made, they were simply not illegal. Cordless telephone conversations were at that time specifically excluded from Title 3. The Fifth Circuit said in the Smith case that the argument that Title 3 applies to cordless phone communications has been uniformly rejected by every court [p. 36] that has considered it.

Now, Mr. Smith did argue that his conversations ought to be covered anyway because they were oral conversations, and the court shut him down immediately, rejected that argument as being out of step with both the language of the statute which said – it said oral communications, not radio communications, and with the legislative history – and apparently at that time congress specifically had not included radio communications under the statute. They did later. They didn't at that time. And to include them at that time would be an ex post facto law making the Fifth Circuit decision retroactive.

With the 605 argument, Your Honor, the statute and the case law at the time says that if the communication falls within the protections of Title 3, then it was protected; otherwise, it simply did not. There was a difference between cellular phones and cordless telephones, Your Honor. In this case, we had the cordless phone.

The case law doesn't extend to the person on the other end of the line. The statute didn't extend to the other person on the other end of the line, Your Honor, and that would be simply extending both the statutory law and the case law at that time.

In sum, Your Honor, Gary Lowery has consented to the disclosure of the conversations, so there's no Fourth [p. 37] Amendment protection for those conversations. Henry Volentine and John Tanza were acting in good faith, so even if Volentine was acting as an agent of the government, the exclusionary rule should not apply, and under both statutes in effect at the time and the Fifth Circuit case law at the time, the recordings were not illegal, and the defendant's motion to suppress should therefore be denied. Thank you.

THE COURT: Let me ask you, Ms. Levardsen, you said if we were to concede or something to that effect –

MS. LEVARDSEN: If we are to concede –

THE COURT: That Volentine was an agent – are you doing that?

MS. LEVARDSEN: No, Your Honor.

THE COURT: Mr. Small said he didn't think that you could get up there and make a serious argument

why he wasn't. What's your serious argument why he wasn't?

MS. LEVARDSEN: Why he wasn't is because Mr. Tanza provided him absolutely no direction and no guidance. The 302's, the information, that was simply Volentine relating information to Mr. Tanza.

THE COURT: What about the acquiescence – I mean, he communicates with Tanza. Tanza acts on that and goes out to the airlines and says, this is getting ready to come down and be aware of this. I assume that's what these exhibits that I haven't read yet but I'm going to read are going to [p. 38] say, and at the end of the day – I mean, at some point they put him in this witness program, get him classified, give him a code name, and at the end of the day they end up giving him seven hundred fifty dollars, which he didn't know he was going to get, that's true. But, I mean, if that doesn't get to be an agent, forget the payment, when do you get to be an agent?

MS. LEVARDSEN: I would suggest, Your Honor, at some place where the FBI exercises some amount of control or direction over the individual. This gentleman was acknowledged or recorded as a cooperating witness, Your Honor, someone simply providing information to the government, and that was exactly what he was doing when he reported to Tanza with information. Tanza took down the information. He didn't say do this, do that, don't do that, anything like that.

THE COURT: Well, if you go back to – and Mr. Small characterized it as a Walther test, and I've referred to that, but I'm referring now to United States versus Pierce, the Fifth Circuit case. The government knew of

and acquiesced in the intrusive conduct. That's certainly the case here.

MS. LEVARDSEN: I wouldn't concede that it was intrusive conduct, Your Honor. They knew what Mr. Volentine was doing, certainly.

[p. 39] THE COURT: If the party performing the search intended to assist law enforcement efforts to further his own end – now, further his own end, he certainly wanted to assist law enforcement –

MS. LEVARDSEN: Mr. Volentine did –

THE COURT: Yes.

MS. LEVARDSEN: Yes, I would have to concede that.

THE COURT: Okay, anything else?

MS. LEVARDSEN: Nothing. Thank you, sir.

THE COURT: Mr. Small, let's talk about consent, the case that Ms. Levardsen talked about, I think Jones, good faith, Leon and what the Fifth Circuit – how the Fifth Circuit has interpreted and again, I'll state again, I think extended what Leon said.

MR. SMALL: Your Honor, taking those in turn, the stipulation, I think, disposes of the first contention. The contention, as I understand it, is that because Lowery, by an ad hoc – a post hac revelation of his conversations with Ruskin somehow validates the illegal search Volentine conducted prior to Lowery's having divulged the same information, that doesn't cut it. What the cases say – and we acknowledge in our brief to this court White

and all those decisions say – they adopt the so-called one-party consent. If Mr. Ruskin had been talking to Lowery and unbeknownst to him Lowery recorded every conversation and [p. 40] released them, even though we had – even though we didn't suspect or fear that eventuality, White and every case since it says, in effect, tough luck. One party to the conversation disseminates it. But that's not what happened here.

And, interestingly, let me point out a specific stipulation, and that is Number 22, and that's why I included it in the stipulation. Lowery did not tape record any telephone conversation between he and Ruskin. Nothing was recorded by Lowery. This was intercepted. Lowery can't now by acknowledging – after having been caught and confronted by the FBI and admitting what he did, he can't validate a prior interception by Mr. Volentine. That's not the way the one-party consent cases work.

THE COURT: Well, Ms. Levardsen, why isn't Mr. Small exactly correct right now in the position he's just stated that – what White and these other cases mean? Why isn't that –

MS. LEVARDSEN: Your Honor, if one party to the conversation divulges the substance of the conversation at whatever time, Your Honor, then there's no expectation of privacy. I mean, that –

THE COURT: And you're saying – and let me make sure I understand what you're saying. This Jones case you've cited and referred to this morning is the similar [p. 41] situation where you've got a third party doing the taping?

MS. LEVARDSEN: No, Your Honor. Jones stands for the proposition between the two parties.

THE COURT: I wanted to make sure.

MS. LEVARDSEN: In this case, one of the parties is divulging the substance of the conversations. Those tape recordings are merely corroboration for Lowery's discussion.

THE COURT: You see a distinction between a third party and one of the actual participants?

MS. LEVARDSEN: Of course. And in this case we have one of the actual participants.

MR. SMALL: Judge, if I could put it in an analogous situation, let's suppose that there are co-tenants of an apartment in which a stash of dope is present, and both co-tenants own the dope, and the police go in without a search warrant, no affidavit, no probable cause, no search warrant, and make an admittedly and blatantly unconstitutional seizure of the dope, and they prosecute Occupant A, and he says, huh-uh, motion to suppress, no search warrant for my premises. And their answer is, too bad. Occupant B is now cooperating with us, and he has authorized us to say that that was y'all's dope, and therefore the warrantless entry is now validated.

Your Honor, that turns warrant requirements on its head. You can't after the fact validate an illegal search. [p. 42] She is attempting to unring the wrong bell. The violation occurred when it was intercepted by a third party, not one who had the right to intercept.

I think that Jones deals not with a third party but with a party to the conversation. I acknowledged in my

original brief, the first brief I filed in your court, Judge Melancon, that that line of cases is there, and I explained to the court at that time my understanding as to why they were inapplicable to the facts of this case. I think the argument – it's clearly – it's at least wrong and perhaps frivolous. A third party can't waive that right.

The good faith exception that she cites of Leon – this court knows what Leon dealt with. It dealt with a defective application for a search warrant but one – and that prompted the court to allow for the good faith reliance on that. I am not familiar with the Fifth Circuit case which Your Honor alluded to during your comments, but it seems to me that the government will not be availed by the good faith exception. I know of no case that would extend Leon – and there have been extensions. I know of none which would extend it to this situation where Mr. Volentine, based upon having been told by an FBI agent that his conduct is not illegal, proceeds to tape. I mean, that – no case gets remotely close to extending Leon to this factual situation.

[p. 43] The last point –

THE COURT: I'll say this. I felt compelled in my other case to reverse what I had done and hold valid an unsigned search warrant based on that extension. Now, I want to go back and read that case. I didn't like doing that. I think it – in this district judge's opinion, I'm sure the founding fathers would have been shocked to know that that's what the Fourth Amendment meant, the warrant requirement of the Fourth Amendment, but, as I saw it, it was clear in that case, and I didn't have any way not to do it.

Now, I'm sure the defendants in that case who were subsequently convicted are going to raise it, and I gave reasons as best I could for what I initially did and why I had to reverse that based on the law, but I want to go back and read that case, because I think it's a pretty broad net, and I guess in a perfect world with the technology that existed back at the time of the Constitutional Convention, maybe they would have done things a little different if they could have anticipated it, but I'm stuck with the way the courts, particularly the Fifth Circuit, has said this is how it works. And, again, I want to go back and read that, but the fact that you think this would be a great extension – I mean, the language is there that it very well may be, that I'm compelled to find good faith there. It doesn't set [p. 44] right with me, I'll say that right now, and I may not end up doing it, and I may be of the opinion that it doesn't cover it and let the Fifth Circuit look at it, and we'll find out if in this instance it does, but we'll see how that goes. So I take that very seriously any time I see good faith now. I mean, it's just – it's a pretty wide open field.

Now, your last point I think you said?

MR. SMALL: Your Honor, I really believe that the other points I had initially made note of have pretty much been covered in my initial remarks to the court unless there is another question – a specific question from the court.

THE COURT: No.

MR. SMALL: Your Honor, do you recall – if I might ask the court, is the Fifth Circuit opinion that you've alluded to regarding good faith a reported –

THE COURT: It is.

MS. SMALL: Do you recall the –

THE COURT: I don't, but I'm getting ready to go find it right now.

MS. SMALL: Very well. Thank you very much.

THE COURT: I will share that with both you and the government as soon as we get it.

Okay, and, Ms. Levardsen, just one more crack at anything you need to say for the record?

MS. LEVARDSEN: Nothing further, Your Honor.

[p. 45] THE COURT: We're going to go ahead and recess until 11:30 by this clock, which is a little less than twenty minutes, and if I need any longer than that, I'll get back with you.

MR. SMALL: Thank you, Your Honor.

(Court in recess for forty-five minutes)

THE COURT: Be seated.

During the recess, which was extended somewhat longer than I anticipated or advised the lawyers, I had the opportunity to review the Leon case, the Supreme Court case that reference was made to earlier, and the Fifth Circuit cases that followed it. And I guess this is true about a little bit of knowledge is a dangerous thing, because my recall from a previous case that I made reference to about an unsigned warrant falls in that category as it fits in the context of this case.

Leon and its Fifth Circuit progeny dealt with good faith in the context of a warrant later held to be invalid. Here there's no warrant ever sought, although it appears from the stipulations that the government and the defendant entered into that probable cause for the issuance of a warrant clearly existed. Leon's good faith exception is not applicable to the facts of this particular case.

Relating to the White case and the conversations between the two parties, that line of cases, I think as [p. 46] conceded by Ms. Levardsen, is applicable to two individuals where one is a consenting participant, not to the situation here where you have a third party who, unbeknownst to the participants, is actually doing the recording subsequent to which one of the parties pleads guilty and is now cooperating with the government. I think Mr. Small's analogy is pretty close to trying to right a previous wrong, and so I think White is not applicable to the facts of this case.

Now, one thing – well, let me go ahead – or let me back up.

The defendant has asked for the exclusion of not only the tapes but I think primary derivative evidence. I don't know what that is. I don't know what that means, Mr. Small? What does that mean in this particular case if I grant your motion?

MR. SMALL: I'm sure I can think of something. There must be something derived from those tapes.

Seriously, Your Honor, I suppose that the argument could be made – shall I approach the podium?

THE COURT: I would appreciate that, yes.

MR. SMALL: Yes, I'm sorry.

I suppose that the argument could be made that even the identity of some witnesses whose identity flowed directly from the tapes might be suppressible as derivative [p. 47] evidence or fruits of the illegal seizure of the tapes.

Having said that, I will simultaneously acknowledge that that theory is problematic. I'm not necessarily convinced that evidence that existed in the way of a witness whose identify was revealed would necessarily be suppressible. I think under the Wong Sun analogy though, if there is documentary and perhaps evidentiary evidence flowing directly from the illegally seized tapes, that too would be suppressible if the court is – if the court ultimately grants the motion to suppress the tapes.

THE COURT: Ms. Levardsen, I'm not going to hold you to this now, but we've got a trial coming up here in six days, and I have to assume that you're pretty familiar with your case at this point. Assuming I grant this motion, what type of other, the language is primary or derivative, evidence flows from the tapes that you're aware of? And I'm not holding you to this because I'm hitting you cold with it now, and obviously if something comes up during the trial if I grant this motion, Mr. Small will object, you'll let him know prior to doing that, and I'll rule, but do you right now have any such information that you didn't get from another source or –

MS. LEVARDSEN: No, Your Honor.

THE COURT: I think Mr. Small, in his usual way, was very candid. I thing what I got him to say is,

Judge, I [p. 48] really don't think there's anything out there. That's how I took it. He doesn't have to characterize it any other way now.

MS. LEVARDSEN: The government's case stems from the tapes and the information received from the recordings, Your Honor, and derivative witnesses, as Mr. Small suggests, certainly they flow from the tapes, some of them from Gary Lowery himself as well.

THE COURT: Well, I'm not sure what you just told me. If I grant the motion and I'm right, then you don't have a case, is that what you're saying, I mean, that you can put on consistent with the ruling if I grant the motion?

MS. LEVARDSEN: It effectively guts the government's case, Your Honor.

THE COURT: Well, I will leave that to the government to decide how the government will proceed, and I'm going to go ahead, and I'm going to grant the motion. I'm going to give oral reasons right now for doing that, and I have to anticipate, I didn't know before you just said that, Ms. Levardsen, that this – I mean, I assumed you might want to appeal immediately, and I was going to certainly upset the trial.

MS. LEVARDSEN: I'm sure we will take writs, Your Honor.

[p. 49] THE COURT: I will upset the trial date, that was my intention, so you could do that, because I think it's enough of an issue in this context that I certainly could be wrong, but based on the particular facts of

this case, I don't think so. So I will supplement the oral reasons that I'm about to give with written reasons.

The defendant has filed a motion to suppress the audio tapes that contain the recorded telephone conversations between the defendant and Gary Lowery. The proponent of a motion to suppress has a burden of proving by a preponderance of the evidence that the evidence in question was obtained in violation of his Fourth Amendment right. In order to show a Fourth Amendment violation, the defendant must establish several factors. First, the defendant must show that a government activity intruded upon a reasonable expectation of privacy in such a significant way that the activity can be called a search. Contained within this fact are several elements. Particularly the defendant must show government activity. In this case, the conversations were intercepted and recorded by a private party, Henry Volentine. Mr. Volentine was a neighbor of Mr. Lowery, the party to whom the defendant was conversing. Mr. Volentine intercepted and recorded telephone conversations between Ruskin and Lowery without their knowledge or consent. The private party is considered an agent of the [p. 50] government for Fourth Amendment purposes if the government knew of and acquiesced in the intrusive conduct and if the party performing the search intended to assist law enforcement efforts to further his own ends.

In this case, after intercepting a conversation between Ruskin and Lowery in November, 1992, Volentine contacted a deputy sheriff regarding the interception. This deputy contacted FBI Special Agent John Tanza who then contacted Volentine. Volentine played a recording of an intercepted conversation between Lowery and another

party for Agent Tanza over the telephone. Agent Tanza contacted the Assistant United States Attorney to determine the legality of Volentine recording the conversations and was informed that it was legal. Agent Tanza conveyed this information to Volentine who then proceeded to intercept and record telephone conversations between Lowery and Ruskin from November, 1992 until May, 1993.

During the period in which Volentine intercepted and recorded the telephone conversations between Lowery and Ruskin, Agent Tanza was in periodic contact with Volentine. During these contacts, Volentine informed Agent Tanza about specific details of the conversation. Agent Tanza prepared typed summaries of the information provided by Volentine at each contact and provided these summaries to various airlines in an effort to prevent the activity discussed in [p. 51] the telephone conversations.

Based on these facts, it is clear that the government knew that Volentine was intercepting and recording the telephone conversations and acquiesced in Volentine's activities. Volentine clearly intended to assist law enforcement efforts by intercepting and recording the telephone conversations and did in fact do so. Therefore, Volentine was acting as a government agent when he intercepted and recorded the telephone conversations in question.

The key inquiry in this particular case is whether the interception of Ruskin's phone calls constituted a search within the meaning of the Fourth Amendment. A search occurs when the government infringes an expectation of privacy that society's prepared to consider reasonable. A

subjective expectation of privacy does not by itself give rise to Fourth Amendment protection. The expectation of privacy must be one that society is prepared to recognize as reasonable.

When considering telephone conversations, particularly cordless telephone conversations, many factors, including the actions of the parties, impact the determination about whether an expectation of privacy is reasonable. When conversations that are intercepted are oral, as they were in this case, Section 605 of the [p. 52] Communications Act comes into play. Section 605 makes unlawful the interception and divulgement of an oral radio communication if, and only if, the speaker held a subjective expectation of privacy that was justifiable under the circumstances. Thus, depending on Ruskin's subjective expectations under the circumstances, Ruskin's expectation of privacy may find objective support from Section 605.

It is true that the right to privacy in a personal conversation is generally a reasonable expectation. Furthermore, the Fourth Amendment clearly protects communications carried by land based telephone lines. However, certain types of cordless phones, ones that make frequency – ones whose frequency makes monitoring easy do not meet Fourth Amendment privacy standards.

In light of these considerations, this case presents an unusual situation. Here the defendant Ruskin was using a land based telephone. In fact, Ruskin always used a land based telephone in order to prevent interception of his

conversations. The other party to the conversations, Lowery, was the party using a cordless phone which made the conversations accessible through interception. Lowery was using a cordless phone even though Ruskin had previously told Lowery never to use a cordless telephone when talking to him. Neither Ruskin nor Lowery had knowledge of the interceptions or consented to them. Thus, even though [p. 53] Ruskin purposely used a land based telephone and told Lowery to use a land based telephone and neither party consented to having that conversation recorded, a third party, Volentine, intercepted and recorded the conversations because Lowery was using a cordless phone, and these conversations are now being used against Ruskin.

Under these facts, the court finds that Ruskin had a reasonable expectation of privacy that society is prepared to recognize. The government argues that Ruskin should have inquired about whether Lowery was using a cordless phone at the beginning of each conversation and thus should have anticipated that Lowery may be using a cordless phone despite Ruskin's previous warnings against it.

The court does not accept this burden as necessary for Ruskin to invoke the Fourth Amendment protections in this instance given the particular facts of this case. If the court were to recognize such a requirement, it would be limiting Fourth Amendment protections to the extent that no phone conversations, whether on land based lines or cordless phones, would carry an expectation of privacy because one would be forced to always anticipate that the other party may be using a phone whose technology allows it to be intercepted. Such a requirement would

limit society's expectations of privacy and Fourth Amendment protections with every expansion of technology. Accordingly, the court [p. 54] finds that Ruskin has met his burden of proving that he possessed a reasonable expectation of privacy that society would recognize.

The defendant having demonstrated that a government activity intruded upon a reasonable expectation of privacy in such a significant way that the activity can be called a search, the remaining inquiry is whether the government intrusion was unreasonable given the facts of the case.

Here the government acquiesced to and conducted law enforcement activities based on telephone conversations that were recorded from November, 1992 until May, 1993. the government had reasonable opportunity to obtain a warrant or even investigate to [sic] the party's expectations of privacy based on the circumstances. Accordingly, the court finds the government intrusion was unreasonable given the particular facts of this case, and the defendant's motion to suppress, as I've stated earlier, is granted.

And based on the government's representation, as I said earlier, that I was going to upset the trial, and we will do that without date. I will give written reasons consistent with these oral reasons as quickly as possible.

And procedurally I don't know how that works, Ms. Levardsen, but I assume since I said that, you don't have to do anything until you get the written reasons.

Mr. Small, do you agree with that? Ms. Levardsen's [p. 55] nodding yes.

MR. SMALL: Yes, sir.

THE COURT: I just wanted to make sure. It's still on my docket, I just upset it. And this ruling the government will appeal, or they'll come back later and say, no, you did such a good job and you really didn't mess it up, Judge, that we're not appealing and we're dismissing or we're going to trial with what we've got.

Anything else I need to consider, Ms. Levardsen?

MS. LEVARDSEN: No, Your Honor.

THE COURT: Mr. Small?

MR. SMALL: No, Your Honor.

THE COURT: Court's in recess.

MS. LEVARDSEN: Thank you, Your Honor.

* * *

(End of Proceedings)

[p. 56] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA	*	
VERSUS	*	DOCKET NUMBER
	*	96-30037-01
THOMAS RUSKIN	*	

****

CERTIFICATE OF REPORTER

I, Connie S. Ezell, Official Court Reporter for the United States District Court, Western District of Louisiana, do hereby certify that the foregoing 55 pages are a

true and accurate transcript of the proceedings had in this matter, as hereinabove set forth, and that I have no interest of any nature whatsoever regarding the ultimate disposition of this litigation.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/s/ Connie S. Ezell
CONNIE S. EZELL, RPR, CM
Official Court Reporter

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

UNITED STATES OF AMERICA	:	Cr. No. 96-30037-01
	:	JUDGE MELANCON
VERSUS	:	MAGISTRATE JUDGE
THOMAS RUSKIN	:	SIMON

****

STIPULATION OF FACTS

It is hereby agreed between the defendant's attorney J. Michael Small and the United States of America through the United States Attorney and Assistant United States Attorney Martha J. Levardsen that the following facts are established:

1. Henry Volentine, hereinafter Volentine, a neighbor of Government witness Gary Lowery, hereinafter Lowery, intercepted telephone conversations between Lowery and Thomas Ruskin, hereinafter Ruskin, between November, 1992 and May, 1993 all without the knowledge or consent of Lowery or Ruskin.

2. In November, 1992 Volentine contacted a deputy sheriff regarding his interception and recording of the Lowery/Ruskin conversations.

3. This same deputy then contacted FBI Special Agent John Tanza, hereinafter Tanza, who then contacted Volentine. Volentine proceeded to play over the telephone for Tanza a tape containing a recorded

conversation between Lowery and Jan Leach having to do with what Volentine believed to be the fraudulent acquisition of commercial airline tickets.

4. Tanza contacted Assistant U.S. Attorney Mignonne Griffing and was told by the prosecutor that the interceptions and recordings by Volentine were not illegal.

5. Tanza conveyed the information from AUSA Griffing to Volentine who continued to intercept and record Lowery/Ruskin conversations until May 14, 1993.

6. During the period in which Volentine intercepted and recorded the Lowery/Ruskin telephone conversations he initiated personal contacts with Tanza on February 11, 1993, February 19, 1993, March 29, 1993, May 12, 1993, May 18, 1993, and June 29, 1993.

7. Two of the personal contacts referred to in paragraph six involved personal meetings between Volentine and Tanza and the other four contacts involved telephone conversations. In each of the six instances Volentine provided specific information to Tanza regarding what he and Tanza believed to be a scheme to fraudulently acquire commercial airline tickets. Tanza made detailed notes pertaining to the information provided by Volentine.

8. Tanza prepared a typed summary of the information provided to him by Volentine at each contact referred to in the above paragraph which he then provided to the various airlines in an effort to prevent the fraudulent acquisition of airline tickets. In that regard he prepared lists of Lowery's clients and PTA numbers and other related ticket information which he mailed to the airlines and received oral confirmation from the various carriers in response to his information.

9. Tanza's summaries regarding his six contacts with Volentine are attached to and made part of this stipulation and are marked Joint Exhibits 1 through 6 respectively.

10. Tanza knew throughout the period of the interception of the Lowery/Ruskin calls that Volentine was intercepting and tape recording the private telephone conversations without the consent of Lowery or Ruskin. Tanza provided no guidance nor instructions to Volentine.

11. Foliowing each Volentine/Tanza contact referred to above, Tanza knew that Volentine intended to continue intercepting, tape recording, and divulging to the federal government the content of Lowery/Ruskin telephone conversations.

12. Volentine's purpose in intercepting, recording, and divulging the Lowery/Ruskin telephone conversations was to assist law enforcement efforts and he in fact did assist such efforts vis-a-vis what he perceived to be an illegal scheme to fraudulently obtain commercial airline tickets.

13. On December 14, 1992 Tanza completed FBI forms requesting the New Orleans office of the FBI to register Volentine as a cooperating witness in connection with an investigation of wire fraud and mail fraud on a national level.

14. The FBI forms designating Volentine as a cooperating witness assigned to Volentine the code name "Caller" and also contained information pertaining to his real name, address, age, physical description, and occupation in addition to the general nature of the investigation. The form also contained a section having to do with any possible criminal record of Volentine.

15. The New Orleans office of the Federal Bureau of Investigation approved Tanza's request regarding the registration of Volentine as a cooperating witness on January 26, 1993 and assigned Volentine number 5780.

16. In April, 1993 Volentine turned over to Tanza approximately seventy-three telephone conversations between Lowery and Ruskin which he intercepted and taped beginning in approximately November, 1992 and extending through approximately May, 1993. Volentine was paid $750 in cash by Tanza and Volentine had no knowledge until the payment that he would receive compensation for his services and work product.

17. Tanza provided all of the tape recorded Lowery/Ruskin conversations which he received from Volentine to the United States Attorney's office for the Western District of Louisiana and that information, as well as other information derived from it, resulted in the present indictment against Ruskin.

18. Ruskin always conversed with Lowery on a hard-wire, land-line telephone and never used a portable or cellular telephone in his conversations with Lowery.

19. Ruskin was never told by Lowery that the latter conversed with him on a portable or cellular telephone and Ruskin never specifically asked Lowery whether or not he was conversing on such a telephone.

20. Lowery admits that Ruskin told him to "never talk on a cordless telephone" and indeed confirmed as much in his grand jury testimony at which time Lowery was discussing his various conversations with Ruskin.

21. Volentine intercepted the radio portion of cordless telephone communications that were transmitted between the cordless telephone handset and the base unit of Lowery's telephone.

22. Lowery did not tape record any telephone conversations between he and Ruskin between the dates of November, 1992 and May, 1993 and he did not authorize any one else to tape record conversations between he and Ruskin during that time period. Moreover, Lowery did not provide law enforcement or the government with tape recordings of his conversations with Ruskin which conversations occurred between approximately November, 1992 and May, 1993.

23. After May 1993 Lowery cooperated with the FBI and surreptitiously recorded a number of his conversations with Ruskin and others.

24. No warrant or intercept order were issued authorizing the interception, recording, or dissemination of telephone conversations between Lowery and Ruskin at any time and specifically between the dates of approximately November, 1992 and May, 1993.

Respectfully submitted,

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DEFENDANT'S EXHIBIT 1

196B-NO-55146
JMT:glh

New Orleans source, NO 5780-CW-WC, provided the following information to Special Agent (SA) JOHN M. TANZA on February 11, 1993:

The source advised that GARY LOWERY, Monroe, Louisiana, continues to issue false prepaid tickets to numerous individuals for readily reduced fees. The source advised that LOWERY has issued the following prepaid airlines tickets for the following mention [sic] individuals:

February 3, 1993, NORTHWEST AIRLINES, record locator number YWJ364, traveler MATTED INVERNIZZI, traveled from LAGURDIA [sic] INTERNATIONAL AIRPORT, New York to Miami round trip, cost $925, travel agency LYNN'S TRAVEL, travel agent BOB, prepaid ticket number 0128548311426-4. (Note: Arrangements made through DEMETRI.)

February 3, 1993, NORTHWEST AIRLINES, record locator number ZF9LYW, traveler JAN LEACH, one way Fort Lauderdale, Florida to Laguardia, New York, first class $612, travel agency LYNN'S TRAVEL, travel agent BOB, travel date February 11, 1993, prepaid ticket number 0128546139383-5.

February 4, 1993, NORTHWEST AIRLINES, record locator number 6CUXDS, traveler THOMAS RUSKIN from LAGUARDIA INTERNATIONAL AIRPORT, New York, to West Palm Beach, Florida, round trip ticket cost $925, travel agency LYNN'S TRAVEL, travel agent JERRY, departure date February 5, 1993, return date February 8, 1993, prepaid ticket number 0128547927101, check number 0.

February 4, 1993, NORTHWEST AIRLINES, record locator number 68C8Y6, traveler DIMITRI KARAGEROGE, destination Newark, New Jersey to West Palm Beach, Florida, ticket cost $925 round trip, travel agency LYNN'S TRAVEL, travel agent RANDY, travel dates February 5, 1993, return date February 8, 1993, prepaid ticket number 0128549338907-4.

February 4, 1993, (Note: PERRY MORRISON called NORTHWEST AIRLINES to confirm the prepaid number for THOMAS RUSKIN.) LOWERY advised that he would pay MORRISON a set fee of $20 to $25 each time he would call and verify a ticket for him.

February 5, 1993, LOWERY tried to do a prepaid ticket for PETER LEACH and was told by the airlines after he had set up the record locator number that he would be recontacted to verify the prepaid. The record

locator number used was 66SUB58. LOWERY discontinued the conversation and attempted to make the reservation at a later date.

February 5, 1993, NORTHWEST AIRLINES, traveler PETER LEACH, (Note: NORTHWEST informed LOWERY they would have to call back to verify the travel agency and prepaid number. LOWERY attempted to use a travel agency called COMMUNITY MARKETING TRAVEL, 141 West 67th Street, New York, New York, 10023, 212/496-1300, agency identification number 33838755.) LOWERY discontinued the attempt to make the reservation.

February 5, 1993, NORTHWEST AIRLINES, record locator number 6ZQUD8, traveler PETER LEACH, designation Seattle, Washington to Laguardia, New York, $413 one way, travel agency used HERITAGE TRAVEL, travel agent JEFF, prepaid ticket number 0128535047051, check number 6. (Note: JAN LEACH called NORTHWEST AIRLINES to verify the ticket. LEACH indicated that it was okay. When PETER LEACH went to pick up the ticket at the desk, he was informed that he could not pick it up because it had not cleared.)

HERITAGE TRAVEL is located at 330 Stockbridge Road, Great Ferrington, Massachusetts, 01230, 413/528-4018, agency identification number 22599021.

February 10, 1993, CONTINENTAL AIR AIRLINES, no record locator number issued, Flight 175, traveler NANACHUKA MANUS, designation Newark, New Jersey to Los Angeles, California, one way, travel date February 11, 1993, travel agency ALL ABOUT TRAVEL, travel agent DON, travel agency address 9911 West Pico

Boulevard, Suite 1430, Los Angeles, California, 90035, 310/553-6255, agency identification number 05521983, prepaid ticket number 0058548560517, check 0.

February 10, 1993, CONTINENTAL AIR AIRLINES, record locator number J3LYCT, Flight number 615, traveler CARMEN be-ALESSIO, designation Newark, New Jersey to West Palm Beach, Florida, round trip, travel agency ALL ABOUT TRAVEL, travel agent DON, prepaid ticket number 0058549144676, check number 2. (Note: Home telephone number of be-ALESSIO 212/245-9914.)

DEFENDANT'S EXHIBIT 2

196B-NO-55146
JMT:eps

New Orleans source NO 5780-CW-WC provided the following information to Special Agent (SA) JOHN M. TANZA on February 19, 1993:

Source advised that one GARY L. LOWERY is continuing to issue false prepaid airline tickets to numerous individuals for set fees. Source provided the following information concerning prepaid tickets issued by LOWERY:

Date:	February 11, 1993
Airline:	CONTINENTAL AIRLINES
Record Locator Number:	IMFMVP
Traveler:	MATTEO INVERNIZZI
Travel Arrangements:	Newark, New Jersey, to Miami, Florida
Round-Trip Cost:	$1,025.00
Departure Date:	February 12, 1993
Flight Number:	1009

Return Date:	February 15, 1993
Travel Agency:	ALL ABOUT TRAVEL
Travel Agent:	DON
Travel Agency Identification Number:	05521983
Prepaid Ticket Number:	005-8542561682 Check Digit 4

Subject had PERRY MORRISON contact CONTINENTAL AIRLINES to verify ticket. The ticket was arranged through PIERO SABBADINI who was employed by SOETHBY'S [sic] COMPANY in New York.

Date:	February 11, 1993
Airline:	CONTINENTAL AIRLINES
Record Locator Number:	IRSBPL
Traveler:	THOMAS RUFKIN
Travel Arrangements:	Newark, New Jersey, to Denver, Colorado
Round-Trip Cost:	$1,228.00 First Class
Departure Date:	February 12, 1993
Return Date:	February 19, 1993
Travel Agency:	THOMAS COOK
Travel Agent:	GREG
Travel Agency Identification Number:	23609003
Prepaid Ticket Number:	005-8551130767 Check Digit 4

The CONTINENTAL Ticket Agent indicated they were going to call back to verify the ticket. Subject LOWERY immediately made a second reservation for the same individual as follows:

Date:	February 11, 1993
Airline:	NORTHWEST AIRLINES
Record Locator Number:	6EBRL8

Traveler:	THOMAS RUSKIN
Travel Arrangements:	Traveling from LaGUARDIA INTERNATIONAL AIRPORT, New York, to Denver, Colorado
Ticket Type:	Round-Trip – First Class
Departure Date:	February 12, 1993
Return Date:	February 20, 1993
Travel Agency:	THOMAS COOK
Travel Agent:	GREG
Travel Agency Identification Number:	23609003
Prepaid Ticket Number:	012-8549144676 Check Digit 2

LOWERY had PERRY MORRISON contact NORTHWEST AIRLINES Ticketing to verify the ticket, MORRISON called back to LOWERY and indicated that there was no problem. LOWERY called RUSKIN and left a message on the answering machine indicating that everything was fine. RUSKIN's telephone number noted was (212) 830-8109.

Date:	February 17, 1993
Airline:	CONTINENTAL AIRLINES
Record Locator Number:	JZ2Y5L
Traveler:	NANACHUKA J. MANUS
Travel Arrangements:	LOS ANGELES INTERNATIONAL AIRPORT, Los Angeles, California, to Newark, New Jersey
Ticket Type:	One-Way – First Class
Ticket Cost:	$650.00
Travel Date:	February 18, 1993

Flight Number:	520
Travel Agency:	GARPA TRAVEL Rockport, Massachusetts, Telephone: (508) 586-9500
Travel Agent:	DON
Travel Agency Identification Number:	22560075
Prepaid Ticket Number:	005-8545719801 Check Digit 3

LOWERY called CONTINENTAL AIRLINES to verify ticket at which time he was told everything was okay.

Date:	February 17, 1993
Airline:	NORTHWEST AIRLINES
Record Locator Number:	Z2Z8UO
Traveler:	IVEN SHAW
Travel Arrangements:	LAGUARDIA INTERNATIONAL AIRPORT, New York, to Atlanta, Georgia
Ticket Type:	Round-Trip
Departure Date:	February 18, 1993
Flight Number:	267
Return Date:	February 26, 1993
Flight Number:	798
Travel Agency:	THOMAS COOK TRAVEL Dearborn, Michigan Telephone: (313) 323-4300
Travel Agent:	DON
Travel Agency Identification Number:	23609003
Prepaid Ticket Number:	012-8545719801 Check Digit 3

DEFENDANT'S EXHIBIT 3

196B-NO-55146
JMT:glh

New Orleans source, NO 5780-CW-WC, provided the following information to Special Agent JOHN M. TANZA on March 29, 1993:

The source advised that GARY LOWERY, white male, 502 Auburn Avenue, Monroe, Louisiana, continues to issue prepaid airline tickets that have been illegally obtained. LOWERY charges a set fee to his customers for travel arrangements that he makes. The following is a listing of prepaid airline tickets issued or attempted to be issued by LOWERY:

Date:	March 18, 1993
Airline:	NORTHWEST AIRLINE
Record Locator Number:	Y7QU78
Traveler:	DIMITRI KARAGEORGE
Destination:	LAGUARDIA INTERNATIONAL AIRPORT, New York to West Palm Beach, Florida
Ticket Type:	First Class
Departure Date:	March 19, 1993
Flight Number:	539
Return Date:	March 22, 1993
Flight Number:	893
Ticket Type:	First Class
Ticket Cost:	$925
Travel Agency:	CI TRAVEL CENTER
Travel Agent:	DANNY
Travel Agency Address:	P. O. Box 7539 Hanson, Virginia 23666
Telephone Number:	804/766-1691

Travel Agency Identification Number:	49508266
Prepaid Ticket Number:	012-8547783969 Check Digit 4

Note: LOWERY called NORTHWEST AIRLINES to confirm that the ticket had gone through and the prepaid ticket agent indicated yes it had. LOWERY then called DIMITRI and gave him the information regards [sic] to the ticket. However, later that day, another reservation was made by LOWERY for KARAGEORGE indicating that there may have been a problem when KARAGEORGE went to pick up the ticket at the NORTHWEST desk.

Date:	March 18, 1993
Record Locator:	ZDXB60
Traverler [sic]:	DIMITRI KARAGEORGE
Destination:	LAGUARDIA INTERNATIONAL AIRPORT, New York to Fort Lauderdale, Florida
Departure Date:	March 18, 1993
Flight Number:	251
Return Date:	March 21, 1993
Flight Number:	996
Ticket Type:	First Class
Ticket Cost:	$925
Travel Agency:	AMERICAN AND INTERNATIONAL TRAVEL
Travel Agent:	BOB
Travel Agency ID#:	44529200

Note: The NORTHWEST prepaid ticket agent indicated that she would call back with a prepaid number at which time LOWERY hung up. LOWERY, a short time

thereafter, contacted KARAGEORGE and indicated to him that there was a problem and that the ticket did not go through.

Note: Apparently there had been a problem with the use of the free hand home phone whereas other people in the neighborhood who had similar phones were crossing over LOWERY's frequency. LOWERY could hear conversations from other houses on his freehand phone, therefore, it appears he has gone to the second phone in the house which is a hard-line to make the airline reservations. Information that follows was obtained through the freehand phone when LOWERY called to confirm tickets or to have someone else to confirm a ticket. These recordings were not direct when LOWERY was contacting the airlines to make the reservations.

Date:	March 22, 1993
Airline:	NORTHWEST AIRLINES
Traveler:	IRENA JIERSING
Destination:	Miami, Florida to Hartford, Connecticut
Departure Date:	March 26, 1993
Flight Number:	996
Ticket Type:	First Class – One Way
Ticket Cost:	$462

This information was obtained when LOWERY called NORTHWEST to confirm a prepaid ticket. LOWERY then called PATRICIA JUVET in Miami, Florida and left a message that the ticket had gone through.

Date:	March 23, 1993
Airline:	NORTHWEST AIRLINES
Record Locator:	3H2LJO
Traveler:	DAISY CORSINI

Destination:	LAGUARDIA INTERNATIONAL AIRPORT, New York to West Palm Beach, Florida
Departure Date:	March 23, 1993
Flight Number:	539
Return Flight:	Unknown
Ticket Type:	First Class – Round Trip
Ticket Cost:	$925
Travel Agency:	Unknown
Location:	Groton, Connecticut

Note: LOWERY made this reservation for PETER KNOWELL and contacted him to tell him that the reservation had gone through. LOWERY also contacted PERRY MORRISON to have him confirm his reservation with NORTHWEST AIRLINES.

Date:	March 24, 1993
Airline:	NORTHWEST AIRLINES
Traveler:	THOM RUFKIN
Destination:	LAGUARDIA INTERNATIONAL AIRPORT, New York to Los Angeles
Ticket Type:	One Way
Departure Date:	March 25, 1993
Flight Number:	337
Ticket Type:	First Class
Ticket Cost:	$653

Note: LOWERY called PERRY MORRISON to have him contact the airlines to verify the information. MORRISON called back and said that it was okay. LOWERY contacted RUFKIN in New York and left a message on his answering machine indicating that the ticket had gone through.

Date:	March 24, 1993
Airline:	NORTHWEST AIRLINES
Traveler:	G. E. & E. PELTON
Destination:	LAGUARDIA INTERNATIONAL AIRPORT, New York to Los Angeles
Ticket Type:	One Way
Departure Date:	March 25, 1993
Flight Number:	337
Ticket Type:	First Class
Ticket Cost:	$653

Note: It is indicated that this ticket was paid for through Atlanta. This ticket was requested by RUFKIN and LOWERY contacted him to let him know that everything was okay. LOWERY also used PERRY MORRISON to confirm this reservation through NORTHWEST AIRLINES.

Date:	March 25, 1993
Airline:	NORTHWEST AIRLINES
Traveler:	JEANIE PELTON
Destination:	LAGUARDIA INTERNATIONAL AIRPORT, New York to Los Angeles
Departure Date:	March 26, 1993
Flight Number:	337
Ticket Type:	First Class – One Way
Ticket Cost:	$653

Note: GARY LOWERY made a confirming call to NORTHWEST AIRLINES with [sic] who indicated that everything was fine. LOWERY then called RUFKIN about this ticket and said it was okay to be picked up.

Date:	March 26, 1993
Airline:	NORTHWEST AIRLINES
Traveler:	TOM RUSKIN
Destination:	LOS ANGELES INTERNATIONAL AIRPORT to LAGUARDIA INTERNATIONAL AIRPORT, New York
Departure Date:	March 27, 1993
Flight Number:	308

Note: LOWERY indicated this ticket was paid through Groton, Connecticut. Information obtained when LOWERY called NORTHWEST AIRLINES to confirm the reservation and prepaid.

LOWERY has a second telephone at his residence to which he using [sic] to apparently make the reservations with NORTHWEST AIRLINES. Therefore, information obtained will be much more sparser [sic] in detail than previous.

DEFENDANT'S EXHIBIT 4

196B-NO-55146
JMT:glh

New Orleans source NO 5780-CW-WC, provided the following information to Special Agent JOHN M. TANZA on May 12, 1993:

The source advised that GARY LOWERY, also known as Lane Lowery, Monroe, Louisiana, continues to issue false prepaid airline tickets to numerous individuals for greatly reduced rates. The source advised that LOWERY

has issued the following prepaid airline tickets for the identified individuals:

Date:	April 28, 1992
Airline:	NORTHWEST
Record Locator Number:	65VLVC
Traveler:	THOMAS RUFKIN
Travel Arrangements:	LOS ANGELES INTERNATIONAL AIRPORT, California to LAGUARDIA INTERNATIONAL AIRPORT, New York
Departure Date:	April 28, 1993
Flight Number:	50
Cost:	$650

Note: This conversation was intercepted when LOWERY called NORTHWEST AIRLINES to confirm the reservation. He indicated that the ticket was paid for out of Arlington, Virginia.

Date:	April 28, 1993
Airline:	NORTHWEST
Record Locator Number:	63GQ8O
Traveler:	ELISSA WAGNER
Travel Arrangements:	LOS [sic] INTERNATIONAL AIRPORT to Miami
Departure:	April 29, 1993
Flight Number:	267
Cost:	$613 – First Class – One Way

Note: LOWERY contacted PERRY MORRISON and had him call the airlines to verify the information. LOWERY then called WAGNER and told her to send $200 cash to him for the ticket. WAGNER's telephone number was

identified as 212/838-2916. WAGNER called back to LOWERY and told him that she needed a ticket for another lady but that the lady got nervous and would not go to the airlines to pick it up; therefore, she requested that her ticket be canceled and that she would still send LOWERY the money as prearranged.

Date: April 29, 1993

Note: LOWERY contacted NORTHWEST AIRLINES and indicated that he was with BLUE SKY TRAVEL. LOWERY asked the airlines to confirm the travel agency identification number that they had on their file because there apparently had been some problems with the listing of this number. LOWERY indicated the number was 19500514 and the airlines confirmed that it was in their system and it was okay.

Date:	April 29, 1993
Airline:	NORTHWEST
Record Locator Number:	2C6HV6
Traveler:	DEMETRI CARAGORGE
Travel Arrangements:	Newark, New Jersey to Miami, Florida
Departure:	April 29, 1993
Flight Number:	287

Note: This information was intercepted when PERRY MORRISON contacted LOWERY to confirm that he had called the airlines and everything was okay. Also, it was indicated that the ticket was paid for out of Pittsburgh, Pennsylvania with travel agency telephone number of 412/221-3000.

NAME	Kim Laccasin
Date:	April 29, 1993
Airlines:	NORTHWEST

Record Locator Number:	2E6BDG
Travel Arrangements:	Newark, New Jersey to Fort Lauderdale, Florida traveling through Baton Rouge, Louisiana
Departure Date:	April 30, 1993
Flight Number:	897
Return Date:	May 12, 1993
Flight Number:	915

Note: This information was intercepted in a conversation between LOWERY and JANE LEACH. During this conversation, LEACH told LOWERY that she wanted to split some of the fees that LOWERY was being paid for arranging these tickets since she was providing LOWERY with customers. In a separate telephone call, LEACH called LOWERY and indicated that ticket for KIM LACCASIN was canceled. LOWERY called NORTHWEST who told him the ticket was ready. LOWERY then recontacted LEACH and indicated that the ticket was ready, put LEACH on a conference call with the airlines so that LEACH could hear for herself that the ticket was okay. LOWERY told LEACH to have the lady pick up the ticket.

Date: April 29, 1993

Note: CARAGORGE called LOWERY and told him that he was unable to pick up the ticket at the airlines. CARAGORGE further advised that from now on LOWERY should make the reservations in the name of DeYOUGOSLAVIA which is another name used by CARAGORGE.

Date:	May 5, 1993
Airlines:	NORTHWEST
Record Locator:	None
Traveler:	CLAUDE ROWLAND

Destination:	LAGUARDIA INTERNATIONAL AIRPORT, New York to LOS ANGELES INTERNATIONAL AIRPORT, California
Departure Date:	May 6, 1993
Flight Number:	537 – First Class

Note: This call was intercepted when PERRY MORRISON contacted LOWERY to obtain information to confirm the ticketing with the airlines. Also note that these ticket arrangements were made through DEMETRI CARAGORGE for his friend ROWLAND. Information indicated that this ticket was paid for in New Orleans.

Date: May 8, 1993

Note: LOWERY contacted NORTHWEST AIRLINES to verify agency identification number and their records for UNIVERSAL CAMELOT TRAVEL. The agency identification number used was 36534492, telephone number of the travel agency was 614/461-6688 located at 571 South High Street, Columbus, Ohio, 43215.

Date: May 10, 1993

Note: LOWERY, during a telephone conversation, indicated that he was being audited by the Internal Revenue Service for his 1990 tax return. LOWERY indicated that he had not filed a tax return and that the IRS had caught approximately $38,000 to $40,000 in income that he had deposited into his bank account. LOWERY indicated that this money was accumulated while doing numerous fraudulent airline tickets with DELTA AIRLINES. LOWERY indicated in the conversation that he would have to pay back taxes interest ????? [sic] for this

income that was unreported. LOWERY indicated that he was much smarter now and therefore, he did not deposit the money into the bank accounts.

Date:	May 10, 1993
Airline:	CONTINENTAL
Record Locator:	I7HHRD
Traveler:	PETER KNOLL
Travel Arrangements:	Miami, Florida to Newark, New Jersey
Departure Date:	May 10, 1993
Flight Number:	242
Return Date:	May 26, 1993
Flight Number:	221
Cost:	$925

Note: LOWERY called the prepaid CONTINENTAL desk thereafter, and was informed that the ticket did not go through.

DEFENDANT'S EXHIBIT 5

196B-NO-55146
JMT:glh

New Orleans source, NO 5780-CW-WC, provided the following information to Special Agent JOHN M. TANZA on May 18, 1993:

The source advised that GARY LOWERY, also known as Lane Lowery, Monroe, Louisiana, continues to issue false prepaid airline tickets to numerous individuals for greatly reduced rates. The source advised that LOWERY has issued the following prepaid airline tickets for the identified individuals:

Date:	May 12, 1993
Airline:	NORTHWEST
Record Locator Number:	2HPZRG
Traveler:	TOM RUFKIN
Travel Arrangements:	LAGUARDIA INTERNATIONAL AIRPORT, New York to LOS ANGELES INTERNATIONAL AIRPORT, California
Departure Date:	May 13, 1993
Flight Number:	553 – One Way

Note: The phone conversation was intercepted when LOWERY called PERRY MORRISON to have him call NORTHWEST AIRLINES to verify the status of the ticket. MORRISON called the airlines and recontacted LOWERY informing him that the ticket was okay. LOWERY, in turn, was contacted by RUFKIN who said when he went to go pick up the ticket, they told him it was fraudulent and he was unable to obtain it. Further note that this ticket was paid for out of Newport Beach, California.

Date:	May 13, 1993
Airline:	NORTHWEST
Record Locator Number:	None available
Traveler:	TOM RUFKIN
Travel Arrangements:	One Way – LAGUARDIA INTERNATIONAL AIRPORT, New York, to LOS ANGELES INTERNATIONAL AIRPORT, California
Departure Date:	May 14, 1993
Flight Number:	553 – One Way

Note: This information was obtained when LOWERY contacted MORRISON to have him call the airlines to verify the status of the ticket. A second call was intercepted where RUFKIN contacted LOWERY and informed him that everything was okay and that he picked up the ticket at the airlines. Further note that this ticket was paid for out of a travel agency called WORLDWIDE TRAVEL, Little Rock, Arkansas.

Date:	May 14, 1993
Airline:	NORTHWEST
Record Locator Number:	7P9UU8
Traveler:	TOM RUFKIN
Travel Arrangements:	LOS ANGELES INTERNATIONAL AIRPORT, California to LAGUARDIA INTERNATIONAL AIRPORT, New York
Departure Date:	May 16, 1993
Flight Number:	308

Note: This information was obtained when LOWERY contacted RUFKIN and advised him that the flight arrangements were made. RUFKIN recontacted LOWERY and said everything was okay and he was able to pick up the ticket. Further note that this ticket was paid for out of WORLDWIDE TRAVEL, Little Rock, Arkansas.

Note: LOWERY has had several conversations with a white female name [sic] DEBBIE indicating that DEBBIE was going to Houston, Texas to pick up a quantity of marijuana. DEBBIE advised LOWERY that she will be returning sometime midweek with the requested two packages of marijuana that LOWERY wanted.

DEFENDANT'S EXHIBIT 6

196B-NO-55146
JMT:glh

New Orleans source, NO 5780-CW-WC, provided the following information to Special Agent JOHN M. TANZA on June 29, 1993:

Source indicated that subject, GARY LOWERY, has issued numerous prepaid airline tickets that have been illegally obtained. Source has compiled a list of the travelers with their respective flight information. This list is attached and herein made part of this insert. (Note: The list of travelers is not complete as to all the individuals who traveled.) The list is derived from when the source came in contact with the subject to date. Prior airline tickets used by travelers are currently being compiled by the respective airlines.